

SALMOND
ON THE
LAW OF TORTS

BY
R. F. V. HEUSTON,
M.A. (OXON., DUBLIN); LL.B. (DUBLIN)
Professor of Law in the University of Southampton
Of Gray's Inn and King's Inns, Dublin, Barrister-at-Law

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BY THE AUTHOR

TO THE MEMORY OF

MY SON

WILLIAM GUTHRIE SALMOND

A CAPTAIN IN THE NEW ZEALAND ARMY

WHO IN FRANCE ON THE 9TH DAY OF JULY, 1918

GAVE UP HIS LIFE

IN THE TWENTY-SIXTH YEAR OF HIS AGE

FROM THE PREFACE TO THE SEVENTH EDITION

As this is the first edition of this work for which the late distinguished author is not himself responsible, perhaps rather more is required by way of preface than would otherwise be the case.

The editor of a book by a deceased author of world-wide reputation has to steer between Scylla and Charybdis. It has been recently well said that it is a most common, but nevertheless a most serious, demerit in English legal textbooks of reputation that in the course of time in the hands of successive editors they grow longer and longer by the addition of recent cases, while the older matter is allowed—out of respect for their distinguished authors, or because of what the editors deem to be the limits of their task—to remain as a source of confusion to the reader when it has become out of date and even inaccurate. That is Scylla. On the other hand, there is a temptation for an editor to substitute his own views for those of the author without distinguishing what is his own. That is Charybdis, for he has no ground to expect that his own views will carry the same weight as those of a distinguished author whose opinions have been frequently cited with respect by His Majesty's judges.

In this difficult navigation I have guided myself by one general principle: that the present edition shall be as good a book as I can make it, whilst never forgetting that it is Sir John Salmond's book and not my own.

W. T. S. S.

OXFORD

June 10, 1928

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CHAPTER 1

INTRODUCTORY

§ 1. The Forms of Action ¹

IN order that the following pages may be understood it is necessary to give a short explanation of the manner in which the law of torts has grown. In the fourteenth century remedies for wrongs were dependent upon writs. No one could bring an action in the king's common law courts without the king's writ and the number of writs available was very limited. Where there was no writ there was no right. *Ubi remedium ibi jus*. One of Sir Henry Maine's most famous generalisations explains our early law: "So great is the ascendancy of the law of actions in the infancy of courts of justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure."² Every plaintiff had to bring his cause of action within a recognised form of action, and "the key-note of the form of action is struck by the original writ, the writ whereby the action is begun."³ For five hundred years the writ determined the right. A mistaken choice of a wrong form of action or writ in 1830 would lose a just case. After some preliminary amendments of the law in 1832 and 1838, the Common Law Procedure Act, 1852, provided that "it shall not be necessary to mention any form or cause of action in any writ of summons." Further, by the Judicature Act of 1873, and the rules made under it, every pleading is to "contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies."⁴ Forms of action were abolished by the Common Law Procedure Act, 1852, and the Judicature Act, 1873, empowered all courts to apply the principles of law and equity alike in all courts and provided that in case of conflict the principles of equity should

¹ Maitland, *Forms of Action*, lect. 1; Sutton, *Personal Actions*, cc. 2 and 4; Plucknett, *History*, Bk. II; Hollond, "Writs and Bills" (1944) 8 *Camb. L.J.* 252; Milsom, "Trespass from Henry III to Edward III" (1958) 74 *L.Q.R.* 195, 407, 561.

² *Early Law and Custom*, p. 889.

³ Maitland, *Forms of Action*, p. 299.

⁴ Ord. 19, r. 4.

prevail.⁵ Today “a cause of action” means, it is said,⁶ a factual situation which entitles one person to obtain a remedy from another person in the courts. The House of Lords in *United Australia Ltd. v. Barclays Bank*⁷ finally settled that substance is predominant over form, and this has again been emphasised by the Court of Appeal in *Letang v. Cooper*.⁸

The absence of a remedy is evidence, but no more than evidence, that no right exists.⁹

The forms of action

Yet “an English lawsuit is not a moot or a debate, but an attempt to arrive at a result on the facts before the court: broad academic arguments are quite unsuited to the processes of the English law.”¹⁰ So it is still necessary to know something of the nature and scope of the forms of action. “The forms of action,” said Maitland at the beginning of this century,¹¹ “we have buried, but they still rule us from their graves”—perhaps less imperiously today than when Maitland wrote, for Lord Atkin said¹² that “When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred.” A knowledge of the forms of action is necessary for the following four reasons. First, to one who is wholly ignorant of the old learning many of the older authorities on liability for civil injuries are unintelligible and misleading. Secondly, even at the present day, any satisfactory definition and classification of the different species of such injuries must be based on the old procedural distinctions between the forms of action, and must conform to those distinctions except in so far as they no longer

⁵ *United Australia Ltd. v. Barclays Bank Ltd.* [1941] A.C. 1, 53.

⁶ *Bagot v. Stevens, Scanlan & Co.* [1964] 3 W.L.R. 1162, 1165.

⁷ [1941] A.C. 1.

⁸ [1965] 1 Q.B. 232. This goes very far: Jolowicz, Note, [1964] C.L.J. 200.

⁹ *Dies v. British and International Mining Corporation* [1939] 1 K.B. 724, 738-739; *Sales Affiliates Ltd. v. Le Jean* [1947] Ch. 295, 305; *Nelson v. Larholt* [1948] 1 K.B. 339, 343; *Abbot v. Sullivan* [1952] 1 K.B. 189, 200. See also below §§ 4, 6.

¹⁰ *Duple Motor Bodies v. I. R. C.* [1960] 1 W.L.R. 510, at 526, per Harman L.J.

¹¹ *Forms of Action*, p. 296.

¹² *United Australia v. Barclays Bank* [1941] A.C. 1, at 29.

have any relation to the substantive law of the present day.¹³ Thirdly, questions as to the existence, nature, and extent of liability depend even yet in some instances on the particular kind of writ or remedy that would have been available for the plaintiff under the old practice. A vivid illustration is the case of *Esso Petroleum Co. Ltd. v. Southport Corporation*.¹⁴ The defendants' oil tanker *Inverpool* ran aground on a revetment wall in the Ribble estuary. There was a danger that she might break her back, with the probable loss of the ship herself and the lives of her crew. In order to prevent this the master decided to lighten the ship by jettisoning some of her cargo. The 400 tons of oil so discharged were carried by the action of the wind and tide on to the premises of the Southport Corporation. "Gratitude for deliverance, apart from other instincts, might have inspired a desire to reimburse the Corporation of Southport the amount of the expense to which they were put in cleaning the oil which came unwanted and unwelcome to their shore and to their lake."¹⁵ Esso Petroleum took a different view. As events turned out they were legally justified in doing so. For although the plaintiffs alleged that the deposit of oil on the foreshore gave rise to three distinct causes of action—trespass, nuisance, and negligence—the trial judge decided each one of these allegations adversely to them and his judgment was approved by the House of Lords.¹⁶ Another example is the distinction between the action of trespass and the action of case¹⁷ in so far as the running of time under the Limitation Act, 1939, is concerned. Even today in England this distinction has proved to be important.¹⁸

Another example is the right of a deserted wife to remain in the matrimonial home until the court orders her to give up possession. Originally this right was regarded as being based on the inability of the husband to sue the wife in tort. That inability has been abolished by the Law Reform (Husband and Wife) Act, 1962,¹⁹ but the right of a deserted wife is the same after the Act,

¹³ *Contra*, Diplock L.J. in *Letang v. Cooper* [1965] 1 Q.B. 232, 243.

¹⁴ [1956] A.C. 218 (H.L.).

¹⁵ [1954] 2 Q.B. 182, at 203, *per* Morris L.J.

¹⁶ The different results reached on similar facts in *Cooke v. Wareing* (1863) 2 H. & C. 322 and *Theyer v. Purnell* [1918] 2 K.B. 333 are another example: see below, § 188.

¹⁷ For this, see below, § 2.

¹⁸ *Letang v. Cooper* [1965] 1 Q.B. 232.

¹⁹ See below, § 181.

for "substantive law has a habit of being secreted in the interstices of procedure."²⁰

Fourthly, as Maitland pointed out, a lawyer can still "do his client a great deal of harm by advising a bad or inappropriate course of procedure, though it is true he cannot bring about a total shipwreck of a good cause so easily as he might have done some years ago."²¹ The *Esso Petroleum* case again provides an example. The plaintiffs' case before and at the trial was that the defendants were vicariously responsible for the negligent conduct of the master of the *Inverpool* in his navigation of the vessel. As the master was acquitted of negligence it logically followed that the defendants also went free. The House of Lords (reversing the Court of Appeal) held that it was not then open to the Southport Corporation to allege that Esso Petroleum must discharge the onus of showing that they had not negligently sent the vessel to sea in an unseaworthy condition. Adherence to the pleadings is not "pedantry or mere formalism."²² This statement has often since been cited with approval in unreported cases. It is of particular importance today, when the expansion of the tort of negligence, with its emphasis on the foresight of the hypothetical reasonable man, has tended to emphasise vagueness, informality and imprecision in the law.

Justice according to law

"The law of tort has fallen into great confusion, but, in the main, what acts and omissions result in responsibility and what do not are matters defined by long-established rules of law from which judges ought not wittingly to depart and no light is shed upon a given case by large generalisations about them."²³ For it must always be borne in mind that justice according to

²⁰ *National Provincial Bank v. Hastings Car Mart Ltd.* [1964] Ch. 665, at 684, per Lord Denning M.R.

²¹ *Forms of Action*, p. 303. Sutton, *Personal Actions*, pp. 58-62, gives some practical illustrations.

²² [1956] A.C. 218 at 241, per Lord Radcliffe. In general it is not possible to raise on appeal a point not taken in the court below: *Perkowski v. Wellington Corporation* [1959] A.C. 53. Yet in *Carmarthenshire C.C. v. Lewis* [1955] A.C. 549 the House of Lords appears to have allowed the appeal on a ground which was not argued at the trial.

²³ *Victoria Park Racing and Recreation Grounds Co. Ltd. v. Taylor* (1937) 58 C.L.R. 479, at 505, per Dixon J.

law is the common law ideal. "The qualities that saved English law when the day of trial came in the Tudor age were not vulgar common sense and the reflection of the layman's unanalysed instincts: rather they were strict logic and high technique, rooted in the Inns of Court, rooted in the Year Books, rooted in the centuries."²⁴ Sentiment is a poor guide to decision. So when in 1401 the defendant was about to be held liable for the escape of his fire, his counsel argued that he would be "undone and impoverished all his days if this action is to be maintained against him; for then twenty other such suits will be brought against him," but met with the reply: "What is that to us? It is better that he should be utterly undone than that the law should be changed for him."²⁵ The same answer would be given today. A court should also try not to be influenced by the fact that the plaintiff is a disagreeable person standing on his legal rights.²⁶

§ 2. Trespass and Case²⁷

The term trespass has been used by lawyers and laymen in three senses of varying degrees of generality. (1) In its widest and original signification it includes any wrongful act—any infringement or transgression of the rule of right. This use is common in the Authorised Version of the Bible, and was presumably familiar when that version was first published. But it never obtained recognition in the technical language of the law,²⁸ and is now archaic even in popular speech. (2) In a second and narrower signification—its true legal sense—the term means any legal wrong for which the appropriate remedy was a writ of trespass—*viz.*, any direct and forcible injury to person, land, or chattels. (3) The third and narrowest meaning of the term is that in which, in accordance with popular speech, it is limited to one particular kind of trespass in the second sense—*viz.*, the tort of trespass to land (trespass *quare clausum fregit*).

²⁴ Maitland, *Selden Society*, Vol. 17, p. xviii.

²⁵ *Beaulieu v. Finglam* (1401) Y.B. 2 Hen. IV, f. 18, pl. 6 (reprinted in Fifoot, *History and Sources*, p. 166).

²⁶ As in *Withers v. Perry Chain Co. Ltd.* [1961] 1 W.L.R. 1814, 1816.

²⁷ See Winfield and Goodhart, "Trespass and Negligence" (1933) 49 L.Q.R. 359; Prichard, "Trespass, Case, and the Rule in *Williams v. Holland*" [1964] C.L.J. 284.

²⁸ But Professor Milsom has contended (74 L.Q.R. 407) that "had there been a medieval *Salmond* or *Winfield* trespass would have been the title, not of a chapter, but of the book."

Under the old practice the remedies for torts were in general two in number—namely, the action of trespass and that of trespass on the case²⁹ (commonly called by way of abbreviation “case” simply). Trespass—“that fertile mother of actions”³⁰—was the remedy for all forcible and direct injuries, whether to person, land, or chattels. Case, on the other hand, provided for all injuries not amounting to trespasses—that is to say, for all injuries which were either not forcible or not direct, but merely consequential.³¹ An injury is an actionable wrong. The term forcible is here used in a wide and somewhat unnatural sense to include any act of physical interference with the person or property of another. To lay one’s finger on another person without lawful justification is as much a forcible injury in the eye of the law, and therefore a trespass, as to beat him with a stick. To walk peacefully across another man’s land is a forcible injury and a trespass, no less than to break into his house *vi et armis*. So also it is probably a trespass deliberately to put matter where natural forces will take it on to the plaintiff’s land.³² But when there is no physical interference there is no trespass, and the proper remedy is case: as, for example, in libel, malicious prosecution or deceit.

Injury must be direct

To constitute a trespass, however, it is not enough that the injury should be forcible; it must also be direct and not merely consequential. An injury is said to be direct when it follows so immediately upon the act of the defendant that it may be termed part of that act; it is consequential, on the other hand, when, by reason of some obvious and visible intervening cause, it is regarded, not as part of the defendant’s act, but merely as a consequence of it. In direct injuries the defendant is charged in an action of trespass with having done the thing complained

²⁹ The action on the case (*super casum*), so called because the particular circumstances of the case are set out in the writ, goes back at least to the thirteenth century. For its relation to the Statute of Westminster II—a controversial matter—see Plucknett, *Concise History*, pp. 372–373.

³⁰ Maitland, *Forms of Action*, p. 342. The importance of the distinction was that in trespass if the plaintiff recovered less than forty shillings he was entitled to no more costs than damages, whereas nominal damages in case carried costs with them.

³¹ See Winfield, *Province*, pp. 11–14.

³² See below, § 17.

of; in consequential injuries he is charged in an action of case with having done something else, by reason of which (*per quod*) the damage complained of has come about.^{32a} “And the distinction is well instanced by the example put³³ of a man throwing a log into the highway: if at the time of its being thrown it hit any person, it is trespass; but if after it be thrown, any person going along the road receive an injury by falling over it as it lies there, it is case. Neither does the degree of violence with which the act is done make any difference: for if the log were put down in the most quiet way upon a man’s foot it is trespass; but if thrown into the road with whatever violence, and one afterwards falls over it, it is case and not trespass.”³⁴ To take other illustrations of the distinction: the act of throwing water into one’s neighbour’s premises is a trespass; but to fix a spout in such fashion that rain water is discharged by it into those premises is a mere nuisance actionable in case,³⁵ and to discharge water on to A’s property so that it is carried down to B’s property is a mere nuisance as regards B.³⁶ Throwing a match, whether accidentally or on purpose, into another man’s haystack is a trespass; lighting on one’s own land a fire which spreads into the adjoining property and burns a haystack there is actionable only in case.

When trespass lies

This distinction between direct and consequential injury is not identical with that between intentional and accidental or negligent injury. These are cross-divisions. Trespass lies for all direct injuries, whether wilful or merely negligent. Case is the appropriate remedy for all consequential injuries. This was settled by *Leame v. Bray*,³⁷ in which it was held that the act of the defendant in negligently driving his carriage so as to bring it into collision with that of the plaintiff was actionable in trespass. (In trespass the defendant’s state of mind is irrelevant: the law looks only to the results of his conduct. Wilfulness is not necessary to constitute trespass.) But if it is sought to make a master vicariously

^{32a} Approved in *Hutchins v. Maughan* [1947] V.L.R. 181, 183.

³³ By Fortescue J. in *Reynolds v. Clarke* (1725) 1 Str. 684, 686.

³⁴ *Leame v. Bray* (1808) 3 East 593, at 602, *per* Le Blanc J.

³⁵ *Reynolds v. Clarke* (1725) 1 Str. 684.

³⁶ *Nicholls v. Ely Beet Sugar Factory* [1931] 2 Ch. 84.

³⁷ (1808) 3 East 593. But later it was held the plaintiff could waive the trespass and sue in case: *Prichard*, [1964] C.L.J. 234.

liable for the acts of his servant, case and not trespass is the proper form of remedy—unless, indeed, the particular act complained of is done by the command of the principal.³⁸ At the present day trespass has been somewhat eclipsed by the growth of the action on the case for negligence, and it has even been suggested in two recent cases in the Court of Appeal that the time has come to abolish the difference between trespass and case.³⁹ This is partly because most actions for personal injuries are brought against an employer vicariously liable for the torts of his servant, and partly because of the growth of the rule that the plaintiff must prove negligence when damage has been caused to his person or chattels as a result of the defendant's conduct on the highway, or where his property adjacent to the highway has been injured in consequence of the defendant's conduct on the highway.⁴⁰ Further, it has been held that in an action for personal injuries, whether on or off the highway, the onus is always on the plaintiff to prove intention or negligence in the defendant.⁴¹ But the authority of this case is doubtful, and many lawyers still think there is a difference between trespass and case, and that that difference has important practical consequences—for example, in relation to the burden of proof,⁴² or pleading inevitable accident,⁴³ and the Limitation Act, 1939.⁴⁴ “The two causes of action are not the same now and they never were.”⁴⁵ The action of trespass still has certain procedural advantages, and in an appropriate case will afford a wider degree of protection to the integrity of the subject's person or property than many other systems of law.⁴⁶

³⁸ *Sharrod v. L. & N.W. Ry.* (1849) 4 Ex. 580; *Esso Petroleum Co. Ltd. v. Southport Corporation* [1956] A.C. 218, 244.

³⁹ *Berry v. British Transport Commission* [1962] 1 Q.B. 807, 839; *Letang v. Cooper* [1965] 1 Q.B. 232, 238.

⁴⁰ See below, § 12.

⁴¹ *Fowler v. Lanning* [1959] 1 Q.B. 426; see below, § 52.

⁴² See below, § 91.

⁴³ See below, § 9.

⁴⁴ See below, § 225.

⁴⁵ *Williams v. Milotin* (1957) 97 C.L.R. 465, at 474, *per curiam*.

⁴⁶ Lawson, *Rational Strength of English Law*, Chap. 2.

CHAPTER 2

GENERAL PRINCIPLES OF LIABILITY

§ 3. The Nature of a Tort

(1) Tort and crime

A tort is a species of civil injury or wrong. The distinction between civil and criminal wrongs depends on the nature of the appropriate remedy provided by law.¹ A civil wrong is one which gives rise to civil proceedings—proceedings, that is to say, which have as their purpose the enforcement of some right claimed by the plaintiff as against the defendant. Criminal proceedings, on the other hand, are those which have for their object the punishment of the defendant for some act of which he is accused. It is often the case that the same wrong is both civil and criminal—capable of being made the subject of proceedings of both kinds. Assault, libel, theft and malicious injury to property, for example, are wrongs of this kind. Speaking generally, in all such cases the civil and criminal remedies are not alternative but concurrent, each being independent of the other. The wrongdoer may be punished criminally by imprisonment or otherwise, and also compelled in a civil action to make compensation or restitution to the injured person.²

Damages essential mark of tort

Although a tort is a civil injury, not all civil injuries are torts, for no civil injury is to be classed as a tort unless the appropriate remedy for it is an action for damages. Such an action is an essential characteristic of every true tort. Thus a public nuisance is not to be deemed a tort merely because the civil remedy of injunction may be obtained at the suit of the Attorney-General; it is a tort only in those exceptional instances in which a private person

¹ See Winfield, *Province*, Chap. 8; Williams, "The Definition of Crime" [1955] C.L.P. 107; Pollock, "The Distinguishing Mark of Crime" (1899) 22 M.L.R. 495; Brett, *An Inquiry into Criminal Guilt* (1968), Chap. 2.

² In certain cases a criminal court may order a convicted person to pay a sum of money to the injured party by way of compensation. These compensatory sums are unliquidated, but (unlike damages in tort) are not claimable in the first instance, but only in addition to some punishment.

may recover damages for loss sustained by him in consequence thereof.³ Again, the infringement of a statutory right to hold a fair on a common is remediable only by a declaratory judgment and an injunction when action is brought by the minority of the inhabitants of a parish.⁴ Nor is any wrong a tort if the appropriate remedy is an action, not for unliquidated damages but for a liquidated sum of money—*e.g.*, an action for money paid by mistake, or due under a judgment, or paid to the use of another without contract.⁵ Such claims are classed by our law as quasi-contractual, but in truth they belong neither to contract nor tort, but to the distinct category entitled restitution.⁶

Contrariwise, the fact that damages are small does not necessarily mean that the case is unimportant, as it might in an action of contract, for the action may have been brought to establish a point of principle, or to vindicate wounded feelings or character.⁶ Sometimes a party is under a duty but has some peculiar immunity from suit—*e.g.*, the immunity from suit possessed by a spouse before 1962.⁷ It has been said that in such a case the immunity is purely procedural⁸—there is a tort but the defendant cannot be sued for it. But this view has been strongly denied,⁹ and it may therefore be said that the existence of a sanction is an essential mark of a tort.

Although an action for damages is the essential mark of and the characteristic remedy for a tort, there may be and often are other remedies also. In an action for a private nuisance an injunction may be obtained in addition to damages. Indeed, an injunction is often the first remedy which the practitioner thinks of in such a case, and the only one which is of any real value to the plaintiff.¹⁰ In an action for the detention of a chattel an order for specific restitution may be obtained in certain cases instead

³ See below, § 22.

⁴ *Wyld v. Silver* [1963] Ch. 243.

⁵ *Att.-Gen. v. Canter* [1939] 1 K.B. 318.

⁶ *Steljes v. Ingram* (1903) 19 T.L.R. 534.

⁷ See below, § 181.

⁸ *Broom v. Morgan* [1953] 1 Q.B. 597.

⁹ By Dixon C.J. in *Tooth & Co. Ltd. v. Tillyer* (1956) 95 C.L.R. 605, 615 ("metaphysical unreality"), Glyn-Jones J. in *Auten v. Rayner*, *The Times*, March 15, 1960, and by Salmon L.J. in *Stratford & Son, Ltd. v. Lindley* [1964] 2 All E.R. 209, 228.

¹⁰ So in *H. Mount & Son, Ltd. v. Aspinall* (1960), *The Times*, August 25, the plaintiffs sought an interim injunction to restrain the defendant "from keeping bears, tigers, cheetahs, gorillas, apes and deer on his land and from causing or permitting them to trespass on the plaintiff's land."

of judgment for its value.¹¹ In an action by a plaintiff dispossessed of his land he recovers the land itself in addition to damages if he has suffered any during the period of his dispossession.¹² But in all such cases it is solely by virtue of the right to damages that the wrong complained of is to be classed as a tort.

(2) Tort and Contract¹³

Again no civil injury is to be classed as a tort if it is solely a breach of contract. The distinction today between tort and contract is that the duties in the former are primarily fixed by the law, while in the latter they are fixed by the parties themselves. Further, in tort the duty is towards persons generally; in contract it is towards a specific person or persons.¹⁴ Until the abolition of the forms of action confusion was often caused by the fact that it was possible to sue in tort for causes of action which were really contractual.¹⁵ It may often be of practical importance to determine whether an action is in substance contractual or for a tort—*e.g.*, when the defendant is an infant,¹⁶ or for determining liability for costs under the County Courts Act, 1959,¹⁷ or when it is sought to obtain leave to serve a defendant out of the jurisdiction,¹⁸ or in relation to the running of time under the Limitation Act, 1939¹⁹—in contract time runs from the breach of warranty, in tort from the occurrence of the damage.

Difficulties may arise when the same wrong is both a breach of contract and a tort. There are many instances in which a person voluntarily binds himself by a contract to perform some duty which already lies upon him independently of any contract. The breach of such a contract is also a tort, inasmuch as liability would equally have existed in such a case had there been no contract at all: for example, when a passenger whilst travelling with a ticket is injured owing to negligence, the British Railways Board²⁰ is guilty of a

¹¹ See below, § 44.

¹² See below, § 230.

¹³ Guest, "Tort or Contract?" (1961) *University of Malaya Law Review* 191.

¹⁴ Winfield, *Province*, p. 40.

¹⁵ See 13th edition, p. 11, n. 6.

¹⁶ Below, § 179.

¹⁷ *Jackson v. Mayfair Window Cleaning Co. Ltd.* [1952] 1 All E.R. 215.

¹⁸ *Matthews v. Kuwait Bechtel Corporation* [1959] 2 Q.B. 57.

¹⁹ *Bagot v. Stevens, Scanlan & Co.* [1964] 8 W.L.R. 1162.

²⁰ Note that since the Transport Act, 1962, the British Railways Board is no longer a common carrier.

wrong which is both a breach of contract and a tort. Similarly, a bailee who wrongfully refuses to restore the property lent to him is liable both in contract and in tort: in contract because of his promise to restore it in due time, and in tort because no one has a right to detain another's property without some special justification. Such concurrent liability in tort and contract is found in the case of bailees, carriers,²¹ and probably other persons recognised at common law as exercising a common calling and thereby owing duties to the public, such as smiths and innkeepers.²² It seems that a doctor or surgeon is under a concurrent liability in tort and contract,²³ but not an architect,²⁴ or a stockbroker,²⁵ or a solicitor,²⁶ or a window-cleaner.²⁷ There seems to be a certain unwillingness to hold professional men liable in tort as distinct from contract, and this unwillingness has increased rather than diminished after *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*²⁸ It may be that the line of distinction is between cases in which failure to perform the duty will result in physical injury to person or property and cases in which it will not.²⁹

Exemption clauses

Although parties to a contract are in general free to make what bargain they please, the courts lean against clauses which purport to exempt a party from the liability which would otherwise fall on him.³⁰ Parliament too disapproves of such clauses. Neither the operator of a public service vehicle³¹ nor the Railways, Waterways and London Transport Boards³² are able to limit their liability in respect of the death of, or bodily injury to, any passenger³³ other than one travelling under a free pass. Even if an

²¹ *Groom v. Crocker* [1939] 1 K.B. 194, 222.

²² An action against an innkeeper for failure to receive a traveller is an action on the case: *Constantine v. Imperial London Hotels Ltd.* [1944] K.B. 693.

²³ *Fish v. Kapur* [1948] 2 All E.R. 176.

²⁴ *Bagot v. Stevens, Scanlan & Co.* [1964] 3 W.L.R. 1162.

²⁵ *Jarvis v. Moy, Davies & Co.* [1936] 1 K.B. 399, 406.

²⁶ *Lake v. Bushby* [1949] 2 All E.R. 964, 968; *Bailey v. Bullock* [1950] 2 All E.R. 1167; *Clark v. Kirby-Smith* [1964] Ch. 506.

²⁷ *Jackson v. Mayfair Window Cleaning Co.* [1952] 1 All E.R. 215.

²⁸ [1964] A.C. 465. See below, § 88.

²⁹ Halsbury, 3rd ed., xxviii, 20.

³⁰ *Spurling (J.) Ltd. v. Bradshaw* [1956] 1 W.L.R. 461.

³¹ Road Traffic Act, 1960, s. 161.

³² Transport Act, 1962, s. 43 (7).

³³ As distinct from goods, which may be carried either at Board's Risk or at Owner's Risk.

exemption clause has been validly inserted in a contract, the courts have held that general words in such a clause will not ordinarily exempt the party seeking to rely on them from liability for his own negligence or that of his servants, unless the only scope for the operation of the clause is the negligence of that party or his servants.³⁴ Nor can such a clause be relied upon by a party who has been guilty of a fundamental breach of his obligations under the contract,³⁵ or by a wrongdoing party against one who is not a party to the contract.³⁶ Where but for the contract there would be a concurrent liability in tort and contract the contract may give express protection to what would otherwise be a tort. The plaintiff cannot then disregard any limitation of liability under the contract by alleging a wider liability in tort.³⁷

Privity of contract and tortious liability

At one time it seems to have been thought that if A undertook a contractual obligation towards B, and his non-performance or mis-performance of that obligation resulted in damage to C, then C could not sue A unless he could show that A had undertaken towards him the same obligation as he had assumed towards B. Thus in *Winterbottom v. Wright*³⁸ Lord Abinger C.B., speaking of a contract of repair, said: "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." Enlightenment came only when it was realised that the duty (if any) which A owed to C in such circumstances was not only referable to a legal origin distinct from that of the contractual obligation assumed towards B but also might well be framed in different terms. The "privity of contract fallacy" (as it has been conveniently called) was at last exploded by the House of Lords in *Donoghue v. Stevenson*,³⁹ in which it was held that a manufacturer of

³⁴ *White v. Warwick (John) & Co. Ltd.* [1959] 1 W.L.R. 1285; *Akerib v. Booth & Others Ltd.* [1960] 1 W.L.R. 454 (reversed on another point [1961] 1 W.L.R. 367).

³⁵ *Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd.* [1959] A.C. 576, 587. The burden of proving a fundamental breach is in general on the plaintiff: *Hunt & Winterbottom Ltd. v. B.R.S. (Parcels) Ltd.* [1962] 1 Q.B. 617.

³⁶ *Scruttons Ltd. v. Midland Silicones Ltd.* [1962] A.C. 446.

³⁷ *Hall v. Brooklands Auto-Racing Club* [1933] 1 K.B. 205, 213; *White v. Warwick (John) & Co. Ltd.* [1959] 1 W.L.R. 1285, 1294.

³⁸ (1842) 10 M. & W. 109, at 114.

³⁹ [1932] A.C. 562.

chattels was under a duty to the ultimate user or consumer even though there was no contractual relationship between them. This duty had its origin in the law of tort and not in the law of contract; nor did it amount to a warranty that care had been taken to see that the article was sound—an obligation appropriate only to the contractual relationship of vendor and purchaser: the duty was no more than to take reasonable care to protect the consumer. It has been more difficult to understand that a professional man such as an architect or banker might owe a duty of care to someone other than the other party to the contract. But even here liability has been imposed, whether the damage caused to the plaintiff has been physical,⁴⁰ or financial.⁴¹ So the present position is that the “privity of contract fallacy” has disappeared.⁴² The matter is completely open: the absence of a contract between the parties is but one of the factors to be considered in determining whether liability in tort exists. It is of course also necessary to avoid the converse fallacy of assuming that it will automatically have a good cause of action against A merely because A’s failure to perform his contract with B has resulted in damage to C.

(3) Tort and breach of trust

No civil injury is to be classed as a tort if it is only a breach of trust or some other merely equitable obligation. The reason for this exclusion is historical only. The law of torts is in its origin a part of the common law, as distinguished from equity, and it was unknown to the Court of Chancery.⁴³

Tort defined ⁴⁴

Summing the matter up, we have seen that there are four classes of wrongs which stand outside the sphere of tort:

⁴⁰ *Clay v. A. J. Crump & Son Ltd.* [1964] 1 Q.B. 533 (architect). But it is not easy to explain why an architect should be under a duty in tort towards third parties but not towards his client: see below, § 88.

⁴¹ *Hedley Byrne & Co. Ltd. v. Heller (Partners) Ltd.* [1964] A.C. 465. See below, § 88.

⁴² See Denning L.J. in *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164, 177; *Greene v. Chelsea B.C.* [1954] 2 Q.B. 127, 138.

⁴³ See the question discussed at length, Winfield, *Province*, Chap. 6.

⁴⁴ The terms *tort* and *wrong* were originally synonymous. *Tort* is derived from the Latin *tortum*, while *wrong* is in its origin identical with *wrung*, both the English and the Latin terms meaning primarily, therefore, conduct which is crooked or twisted, as opposed to that which is straight

- (1) Wrongs exclusively criminal;
- (2) Civil wrongs which create no right of action for unliquidated damages, but give rise to some other form of civil remedy exclusively;
- (3) Civil wrongs which are exclusively breaches of contract;
- (4) Civil wrongs which are exclusively breaches of trust or of some other merely equitable obligation.

We may accordingly define a tort as a *civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation.*⁴⁵

§ 4. General Conditions of Liability

In general, a tort consists in some act done by the defendant whereby he has without just cause or excuse caused some form of harm to the plaintiff.⁴⁶ The law of torts exists for the purpose of preventing men from hurting one another, whether in respect of their property, their persons, their reputations, or anything else which is theirs.⁴⁷ The fundamental principle of this branch of the law is *alterum non laedere*—to hurt nobody by word or deed. An action of tort, therefore, is usually a claim for pecuniary compensation in respect of damage suffered as the result of the invasion of a legally protected interest. An interest is a claim or demand or want or desire put forward by man in a civilised society. The task of the courts is first, to decide which interests should receive legal protection, and secondly, to hold the balance

or right (*rectum*). Tort, however, has become specialised in its application, while *wrong* has remained generic. No satisfactory definition of a tort has yet been found: "Never did a Name so obstruct a true understanding of the Thing": Wigmore, *Cases on Torts*, i, Preface, p. viii. For criticisms of suggested definitions, see Prosser, *Torts*, pp. 1-7; Winfield, *Province*, Chap. 12. On Winfield's own definition (*Province*, pp. 32, 229; *Tort*, p. 5) see the criticism of Denning L.J. in 63 L.Q.R. 517. Landon (Bell *Yard*, Nov., 1931, 20, 32) defined a tort as "a breach of duty which would have been remediable before 1852 by one of the writs of trespass, case and detinue."

⁴⁵ This definition was cited by Tucker L.J. in *Anglo-Saxon Petroleum Co. Ltd. v. Damant* [1947] K.B. 794, 796.

⁴⁶ "Harm is the tort signature": Seavey, "Principles of Torts" (1942) 56 Harv.L.Rev. 72, 73; "The common thread woven into all torts is the idea of unreasonable interference with the interests of others": Prosser, *Torts*, p. 6. We shall see later (§ 10) that it is easier to explain the objects of the law of torts than to define a tort.

⁴⁷ *Lee Cooper Ltd. v. Jenkins (C.H.) & Sons Ltd.* [1964] 1 Lloyd's Rep. 300, 311.

between interests which have received protection. It is obvious that not all objects of human desire can or should receive legal protection. The law began by affording protection against invasion of interests in bodily security, integrity of land or chattels, and freedom of reputation. In the course of time it has recognised other and less obvious (but perhaps equally valuable) interests.⁴⁸ Thus interests in the security of domestic or contractual relationships have been protected, and in recent years considerable advances have been made in the direction of protecting interests in emotional security,⁴⁹ and in protecting financial or pecuniary interests against careless invasions.⁵⁰ "To my mind the great blemish on the law of torts is its failure to provide adequately for injury other than physical done maliciously or carelessly. This seems to me to be due simply to under-development. The concept of negligence has been exploited up to a point, but has not apparently retained sufficient of its initial impetus to jump the barrier between the corporeal and the incorporeal."⁵¹

Damnum sine injuria

There are many forms of harm of which the law takes no account. Damage so done and suffered is called *damnum sine injuria*,⁵² and the reasons for its permission by the law are various and not capable of exhaustive statement. For example, the harm done may be caused by some person who is merely exercising his own rights; as in the case of the loss inflicted on individual traders by competition in trade,⁵³ or where the damage is done by a man acting under necessity to prevent a greater evil.⁵⁴ Other examples may be found in the law relating

⁴⁸ See Wright, "The Law of Torts: 1923-1947" (1948) 26 Can.Bar Rev. 46; Williams, "The Aims of the Law of Torts" [1951] C.L.P. 157; Braybrooke, "Some Recent Developments in the Law of Torts" (1958) 4 Univ. of W.A. Ann.L.Rev. 209; Wright, "The Adequacy of the Law of Torts" [1961] C.L.J. 44; Lipstein, "Protected Interests in the Law of Torts" [1963] C.L.J. 85.

⁴⁹ See below, § 84.

⁵⁰ See below, § 83.

⁵¹ Devlin, "Law and Morals" (Holdsworth Club, 1961), p. 22.

⁵² The term *injuria* is here used in its original and proper sense of *wrong* (in *jus*, contrary to law). The modern use of "injury" as a synonym for damage is unfortunate but inveterate. It is to be hoped, however, that the observations of Lord Simon L.C. in *Crofter Hand Woven Harris Tweed Co. v. Veitch* [1942] A.C. 435, 442, may lead to a return to a stricter use of the word.

⁵³ See below, Chap. 17.

⁵⁴ See below, § 11.

to damage caused by defamatory statements made on a privileged occasion.⁵⁵ Or the harm complained of may be too trivial, too indefinite, or too difficult of proof for the legal suppression of it to be expedient or effective. Thus no action will lie for mere mental suffering unaccompanied by physical harm, though caused by the wilful act or carelessness of the defendant.⁵⁶ So also the harm done may be of such a nature that the law considers it inexpedient to confer any right of pecuniary redress upon the individual injured, but provides some other remedy, such as a criminal prosecution, as exclusively appropriate. Such is the case, for example, with the harm which an individual suffers in common with the public at large by reason of the existence of a public nuisance.⁵⁷ Or pecuniary redress may be given by the law of contract rather than the law of tort: so the Court of Appeal has held that a landlord who cut off his tenant's supply of gas and electricity without entering the premises was liable only for a breach of contract: there is no separate tort entitled "eviction."⁵⁸ So too a landlord who serves a valid notice to quit cannot be held liable in tort because his motive was the vindictive one of punishing the tenant for having given evidence against him in other proceedings. There is no right of action for damages for contempt of court.⁵⁹ /

Injuria sine damno

Just as there are cases in which damage is not actionable as a tort (*damnum sine injuria*), so conversely there are cases in which behaviour is actionable as a tort, although it has been the cause of no damage at all (*injuria sine damno*). Torts are of two kinds—namely, those which are actionable *per se*, and those which are actionable only on proof of actual damage resulting from them. Thus the act of trespassing upon another's land is actionable even though it has done the plaintiff not the slightest harm. Similarly, a libel is actionable *per se*, while slander (that is to say, oral as opposed to written defamation), is in most cases not actionable without proof of actual damage.⁶⁰

⁵⁵ Below, § 68.

⁵⁶ See below, § 84.

⁵⁷ See below, § 22.

⁵⁸ *Perera v. Vandiyar* [1953] 1 W.L.R. 672.

⁵⁹ *Chapman v. Honig* [1968] 2 Q.B. 502.

⁶⁰ It has been said that the law conclusively presumes damage in such cases: *Nicholls v. Ely Beet Sugar Co.* [1936] Ch. 848, 850-851.

The importance which the law places upon the security of the plaintiff's interests in such a case can be seen from the fact that the onus lies on the defendant to justify his conduct—*e.g.*, in an action of libel the defendant must show that the statement is true or privileged or protected by whatever other defence may be available. On the other hand, in torts such as negligence or malicious prosecution the onus lies on the plaintiff to show that the conduct of the defendant is legally unjustified. /

• Is there any general principle of liability? ⁶¹

Since, therefore, all harm is not actionable, it is necessary to ascertain whether liability for harm is the general rule, subject to specific exceptions based on definite grounds, or whether, on the contrary, the general rule is one of exemption from liability save in those specific instances in which the law declares that particular kinds of harm are wrongful. In other words: Does the law of torts consist of a fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse, or does it consist of a number of specific rules prohibiting certain kinds of harmful activity, and leaving all the residue outside the sphere of legal responsibility? Salmond took the view that the second of these alternatives was that which had been accepted by our law. "Just as the criminal law consists of a body of rules establishing specific offences, so," he said, "the law of torts consists of a body of rules establishing specific injuries. Neither in the one case nor in the other is there any general principle of liability. Whether I am prosecuted for an alleged offence, or sued for an alleged tort, it is for my adversary to prove that the case falls within some specific and established rule of liability, and not for me to defend myself by proving that it is within some specific and established rule of justification or excuse." For Salmond there was no English law of tort; there was merely an English law of torts, that is, a list of acts and omissions which, in certain conditions, were actionable. This book is entitled the Law of Torts, not the Law of Tort. "The forms of action," Salmond said elsewhere,⁶²

⁶¹ Williams, "The Foundation of Tortious Liability" (1939) 7 Camb.L.J. 111; Goodhart, "The Foundation of Tortious Liability" (1938) 2 M.L.R. 1; Green, "Thrust and Torts" (1961) 64 W.Va.L.R. 1, 115, 441.

⁶² "Observations on Trover and Conversion" (1905) 21 L.Q.R. 43.

"are dead, but their ghosts still haunt the precincts of the law. In their life they were powers of evil, and even in death they have not wholly ceased from troubling." Every plaintiff must bring his case under one of the recognised heads of tort.⁶³

Invention of new torts

In 1927, however, Winfield argued⁶⁴ that it is very doubtful whether this is true now, or ever has been true. There is not a single case⁶⁵ in the reports, he said, in which an action has been refused on the sole ground that it was new. It has been clearly established ever since the memorable judgment of Sir John Holt C.J. in *Ashby v. White*⁶⁶ that mere novelty is no bar to an action. "I wish never to hear this objection again," said Sir Charles Pratt C.J. sixty years later.⁶⁷ "This action is for a tort: torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief." Similar statements may be found in more modern cases.⁶⁸ The novelty of a claim may raise a presumption against its validity, and a court may remark: "It is enough to say that the world has gone on very well without such actions as these; and I doubt whether it would continue to do so if such things were allowed."⁶⁹ But there is undoubtedly power to recognise a novel claim if justice so requires. We can trace the origin of many torts which are recognised as such at the present day, of malicious prosecution,⁷⁰ of deceit in *Pasley v. Freeman*,⁷¹ of inducement of breach of contract in *Lumley v. Gye*,⁷² of the action for inducing a wife to leave her husband in *Winsmore v.*

⁶³ See above, § 1.

⁶⁴ "The Foundation of Liability in Tort" (1927) 27 Col.L.Rev. 1; Essays, 3.

⁶⁵ Though see *Barnardiston v. Soame* (1676) 6 St.Tr. 1063; *Hunt v. Damon* (1930) 46 T.L.R. 579.

⁶⁶ (1702) 2 Ld.Raym. 938; 14 St.Tr. 695. The question was whether an action lay against a returning officer for refusing to accept the vote of an elector. The Chief Justice, against the opinion of his three puisnes, held that it did, and his dissenting judgment was upheld in the House of Lords.

⁶⁷ *Chapman v. Pickersgill* (1762) 2 Wils. 145, at 146.

⁶⁸ *Allen v. Flood* [1898] A.C. 1, 127-128; *Best v. Samuel Fox Ltd.* [1950] 2 All E.R. 798, 800; *Abbott v. Sullivan* [1952] 1 K.B. 189, 216.

⁶⁹ *Revis v. Smith* (1856) 18 C.B. 126, at 141, per Cresswell J., cited with approval in *Marrinan v. Vibart* [1963] 1 Q.B. 234, 239. The "thing" was an action for damages in respect of perjured evidence.

⁷⁰ Winfield, *History of Conspiracy*, Chap. 5.

⁷¹ (1789) 3 T.R. 51.

⁷² (1858) 2 E. & B. 216.

Greenbank,⁷³ of libel,⁷⁴ and of negligence.⁷⁵ Again, it was only in 1964 that the existence of the tort of intimidation was definitely established,⁷⁶ the House of Lords affirming that it had power to adapt the common law to changing social circumstances.⁷⁷ But there are limits, difficult to state, but understood by most practitioners, "to what we can or should do. If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations: that must be left to legislation."⁷⁸

Winfield said that he preferred the theory that "all injuries done to another person are torts, unless there is some justification recognised by law." But his thesis did not find general acceptance and he later modified his opinion to the extent of admitting that "from a narrow practical point of view" Salmond's view "suffices," though he still thought that "from a broader outlook" his own theory was valid.⁷⁹ Pollock also criticised Salmond's views,⁸⁰ and argued persuasively for the view that there is a general right not to be damaged intentionally without just cause or excuse. There are certainly some powerful judicial dicta to support this view,⁸¹ at least when physical damage to property is concerned, but also some which are against it.⁸²

⁷³ (1745) Willes 577.

⁷⁴ Holdsworth, H.E.L., viii, 346-378.

⁷⁵ "If you read the great cases of *Ashby v. White*, *Pasley v. Freeman* and *Donoghue v. Stevenson* you will find that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed": *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164, at 178, *per* Denning L.J. But it is worth recalling what Sir Francis North C.J. said in *Barnardiston v. Soame* (1674) 6 St.Tr. 1063, at 1115: "My brother Atkyns said, the common law complied with the genius of the nation; I do not understand the argument. Does the common law change? Are we to judge of the changes of the genius of the nation? Whither may general notions carry us at this rate?"

⁷⁶ *Rookes v. Barnard* [1964] A.C. 1129.

⁷⁷ *Rookes v. Barnard* [1964] A.C. 1129, 1169.

⁷⁸ *Myers v. D.P.P.* [1964] 3 W.L.R. 145, at 156, *per* Lord Reid.

⁷⁹ Winfield, *Tort*, p. 14.

⁸⁰ *Torts*, Chap. 2.

⁸¹ See, e.g., *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889) 23 Q.B.D. 598, 613; *J. Bollinger v. Costa Brava Wine Co. Ltd.* [1960] Ch. 262, 283; *Rookes v. Barnard* [1964] A.C. 1129, 1216.

⁸² *Abbott v. Sullivan* [1952] 1 K.B. 189, 200 (Denning L.J.).

Conclusion

To some extent the critics seem to have misunderstood Salmond. He never committed himself to the proposition, certainly untenable now, and probably always so, that the law of torts is a closed and inexpansive system.⁸³ As a distinguished author has remarked: "To say that the law can be collected into pigeon-holes does not mean that those pigeon-holes may not be capacious, nor does it mean that they are incapable of being added to."⁸⁴ Salmond merely contended that these changes were not exclusively referable to any single principle. In this he was probably right. We shall see that the factors relevant to a decision to impose, or not to impose, liability are many and varied.⁸⁵

§ 5. Emergent Torts

There are a number of cases in which the courts have displayed willingness to create new heads of liability. No more can be done here than to indicate the present state of development of four of these doubtful torts: (1) Invasion of Privacy; (2) Abuse of statutory powers; (3) Infringement of status; (4) Malice.

(1) Invasion of Privacy

The right to privacy is recognised by the overwhelming majority of American courts, whose decisions have been analysed by Dean Prosser under four different headings which are adopted here for the sake of convenience.⁸⁶

First, the tort covers cases in which there has been an intrusion upon the plaintiff's seclusion or solitude, or into his private affairs. This head of liability has obvious affinities with the present law governing trespass to the person or property,⁸⁷ or nuisance,⁸⁸ or breach of copyright or infringement of patents or

⁸³ See his *Jurisprudence*, 11th ed., p. 164.

⁸⁴ Williams, 7 Camb.L.J. at 114.

⁸⁵ See below, § 10.

⁸⁶ Prosser, "Privacy" (1960) 48 Calif.L.Rev. 385. See also Winfield, "Privacy" (1931) 47 L.Q.R. 23; Gutteridge and Walton, "The Comparative Law of the Right to Privacy" (1931) 47 L.Q.R. 203, 219; Neill, "The Protection of Privacy" (1962) 25 M.L.R. 393. In 1961 the H.L. (against the advice of Kilmuir L.C.) gave a Second Reading to a Right of Privacy Bill, which was later dropped. The debates (229 H.L. Deb. 5 s. col. 607; 232 H.L. Deb. 5 s. col. 289) should be studied.

⁸⁷ In *Sheen v. Clegg*, *Daily Telegraph*, June 22, 1961, damages for trespass were awarded against a defendant who had secretly installed a microphone over the plaintiff's marital bed.

⁸⁸ It may be a nuisance maliciously to telephone another unreasonably often: see below, § 24.

trade marks,⁸⁹ or the intentional infliction of emotional distress. English law gives an adequate remedy in these cases. In the past a plaintiff might have obtained exemplary or vindictive damages if the conduct of the defendant had been outrageous or disgraceful, but the scope for the award of those damages is now severely limited.⁹⁰ But the common law, as we shall see, gives no remedy to one who complains that his neighbours have spied from their windows into his premises, or who have cut off an attractive view from his house by erecting a spite-fence.⁹¹ Nor again is any remedy at present given to one who complains that his photograph (or other likeness) has been taken and reproduced without his permission⁹² unless the publication is defamatory, and it must be remembered that truth is a defence to an action for libel.⁹³ Nor does there seem to be any remedy for the interception of telephonic or other conversations.⁹⁴ There is clearly a need for some development of the law here if the right of individual freedom is to be safeguarded properly in the age of such scientific achievements as micro-miniature radio transmitters, subliminal and subaudial projection of images, truth drugs, the tape-recorder, and television. Indeed the Superior Court of Quebec has awarded damages on the following facts. The plaintiff wrote to a television company to complain about the quality of one of their programmes. The announcer displayed the plaintiff's name and address on the screen and invited listeners to write or telephone to the plaintiff saying what they thought of his conduct. The resultant barrage of offensive letters and telephone calls was so great that the plaintiff was obliged to disconnect his telephone and suffered severe inconvenience and worry.⁹⁵

Secondly, there are cases in which complaint is made about the public disclosure of embarrassing private facts about the

⁸⁹ Note that there may be a claim for breach of confidence even though there is no contract: *Microtherm Electrical Co. Ltd. v. Percy* [1957] R.P.C. 207; *Argyll v. Argyll* [1965] 2 W.L.R. 790.

⁹⁰ *Rookes v. Barnard* [1964] A.C. 1129.

⁹¹ See below, § 28.

⁹² See Greer L.J. in *Tolley v. Fry* [1930] 1 K.B. 467, 478.

⁹³ As it was in *Dunlop Rubber Co. Ltd. v. Dunlop* [1921] 1 A.C. 867. See below, p. 199. *Funston v. Pearson*, *The Times*, March 12, 1915, was cited in previous editions as an authority to the contrary, but Scrutton J. clearly rested his decision on the fact that it was defamatory to publish a photograph of a young lady without any teeth.

⁹⁴ See Heuston, *Essays in Constitutional Law*, Chap. 4.

⁹⁵ *Robbins v. C.B.C.* (1958) 12 D.L.R. (2d) 85.

plaintiff—for example, that he does not pay his debts. In the leading American case the defendant published to the world an account of the plaintiff's earlier career as a prostitute and the accused in a sensational murder trial. The plaintiff, who had quite left aside her earlier life of shame and now moved in reputable society, recovered damages.⁹⁶ As the English law stands at the moment, the defendants would have the defence of justification if sued for libel in such a case. In any event, the material so published must be objectionable to a reasonable man of normal sensibilities.⁹⁷

Thirdly, there are cases relating to defendants who place the plaintiff in a false light in the public eye by publishing untrue statements about him. Here there will sometimes be a remedy under the law of defamation as it stands at the moment. The law on the matter can be traced back to a case in which the poet Byron obtained an injunction to restrain the publication of some spurious poems alleged to be by him.⁹⁸

Fourthly, there are cases in which the defendant has appropriated for his own purposes some attribute of the plaintiff's name or identity. The law at the moment does not prevent any person from calling himself by the name of another, so long as he has no fraudulent purpose in doing so.⁹⁹ There is, however, some protection given in cases where a proprietary interest has been infringed, as we shall see later from the law governing the use of trade names and trade marks and copyright.¹

(2) Abuse of statutory powers

There are cases which indicate that damage caused by the excessive² or malicious³ or negligent⁴ exercise of statutory

⁹⁶ *Melvin v. Reid* (1931) 112 Cal.App. 285, 297 Pac. 91.

⁹⁷ *Sidis v. F-R Publishing Corporation* (1940) 118 F. (2d) 806.

⁹⁸ *Byron v. Johnston* (1816) 2 Mer. 29. As Pollock said (R.R., Vol. 16, Preface, v): "Lord Eldon has been often called hard names (unduly, as most lawyers think) for depriving Shelley of the custody of his truly begotten children: I am not aware that the world of letters has ever given him due credit for helping Byron to repudiate the spurious offspring which some pirate bookseller sought to father on him."

⁹⁹ See below, § 165.

¹ See below, § 166.

² *Warne v. Varley* (1795) 6 T.R. 443.

³ *David v. Abdul Cader* [1963] 1 W.L.R. 834 does no more than suggest there may be a remedy, contrary to the view of earlier English cases. *Roncarelli v. Duplessis* [1952] 1 D.L.R. 680 definitely grants one, but as in *David v. Abdul Cader*, the court was applying the civil law, not the common law.

⁴ See below, § 16.

powers by a public authority is actionable. This is an area of the law which may see some developments. In the present age it is of great importance that statutory powers of licensing and control should be exercised honestly and fairly. The public law remedies of the prerogative orders for quashing erroneous decisions may need to be reinforced by an action for damages.

(3) Infringement of a status

In the modern world a man may suffer serious loss by reason of his expulsion from a trade union or trade association, or the revocation of a licence which is necessary to carry on his trade or profession. The courts are aware of the problem,⁵ but it is only in a few cases that the remedies of damages or injunction or declaratory judgment are available⁶ for an improper expulsion. Apparently no remedy at all is given for a refusal to admit to membership, however unreasonable and however productive of loss to the plaintiff.⁷

(4) Malice

An eminent judge has suggested, both judicially⁸ and extra-judicially,⁹ that a tort of malicious interference with business or livelihood might be developed. The suggestion is opposed to much authority, but deserves more consideration.

§ 6. Malice¹⁰

The term malice, as used in law, is ambiguous, and possesses two distinct meanings which require to be carefully distinguished. It signifies either (1) the intentional doing of a wrongful act, without just cause or excuse; or (2) action determined by an improper motive. To act maliciously means sometimes to do the act intentionally, while at other times it means to do the act

⁵ See Lord MacDermott, *Protection from Power under English Law*; Thompson, "Protection of the Right to Work in the Law of Torts" (1963) 41 Can. Bar Rev. 167.

⁶ *Bonsor v. Musicians' Union* [1956] A.C. 105; *Vine v. National Dock Labour Board* [1957] A.C. 488.

⁷ *Farman v. Film Artists' Association* [1964] A.C. 925.

⁸ *Rookes v. Barnard* [1964] A.C. 1129, at 1216, per Lord Devlin.

⁹ *Samples of Lawmaking* (Oxford, 1962), pp. 11-13.

¹⁰ Gutteridge, "Abuse of Rights" (1936) 6 Camb.L.J. 22; Marsh, "Deduction and Induction in the Law of Torts" (1951) 84 J.C.L. 59; O'Sullivan, "Abuse of Rights" [1955] C.L.P. 61; Fridman, "Malice in the Law of Torts" (1958) 21 M.L.R. 484.

from some wrong and improper motive, some motive of which the law disapproves. This motive need not be that of spite or ill-will—that is to say, it need not amount to malice in the narrow and popular sense of the term. Any motive is malicious in the second sense which is not recognised by law as a sufficient and proper one for the act in question.

(1) Wilful and conscious wrongdoing

It is to malice in the first sense that the well-known definition in *Bromage v. Prosser*¹¹ is exclusively applicable: "Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse." Salmond¹² supported his theory of a general fault-basis for liability by defining "malice" in the legal as opposed to the popular sense as "wilful and conscious wrongdoing." But the use of the term malice in this technical sense merely befogs the issue. It is true that sometimes the conservatism of pleaders has retained in statements of claim the allegation that the defendant "maliciously" or "falsely and maliciously" did the acts complained of¹³; but it was recognised as long ago as 1674 that these allegations were mere verbiage, which could not affect the legal characteristics of the act.¹⁴

(2) Improper motive

Clearly to be distinguished from this first sense of the term malice is the second sense, in which it signifies the existence of an improper motive. Thus, malicious prosecution does not mean the intentional and wrongful prosecution of an innocent man; it means the prosecution inspired by an improper motive—a motive which the law does not allow and sanction: for

¹¹ (1825) 4 B. & C. 247, at 255, *per* Bayley J. See also *Mogul Steamship Co. v. McGregor, Gow & Co.* (1869) 23 Q.B.D. 598, 612; *Allen v. Flood* [1898] A.C. 1, 94.

¹² 6th ed., pp. 16–17.

¹³ As in actions for defamation.

¹⁴ "If we should make the words *falso et malitiose* support an action without a fit subject-matter, all the actions of mankind would be liable to suit and vexation: they that have the cooking (as we call it) of declarations in actions of the case will be sure to put in the words, let the case be what it will; they are here pepper and vinegar in a cook's hand, that help to make sauce for any meat, but will not make a dish of themselves": *Barnardiston v. Soame* (1676) 6 St.Tr. 1068, at 1114, *per* Sir Francis North C.J. See Sharwood, "*Barnardiston v. Soame*; A Restoration Drama" (1964) 4 Melbourne University Law Review, 502.

example, the extortion of money.¹⁵ A prosecution so inspired may be actionable even though there was an honest belief in the guilt of the accused. Nuisance, conspiracy, and injurious falsehood are other torts in which malice is on occasion relevant.¹⁶ Similarly, defamation which (even though honestly and on reasonable grounds believed to be true in fact and therefore not actionable) is inspired by malice, *i.e.*, an improper motive, loses the protection which the law normally affords to defamatory statements made on occasions of qualified privilege. An improper motive may also be relevant in the assessment of damages. The arrogant, wicked, or spiteful conduct of the defendant may inflame the damages awarded against him for an otherwise ordinary libel, assault, or trespass.¹⁷ Save in such exceptional cases malice in the sense of improper motive is entirely irrelevant in the law of torts. The law in general asks merely what the defendant has done, not why he did it. A good motive is no justification for an act otherwise illegal, and a bad motive does not make wrongful an act otherwise legal. The rule is based partly on the danger of allowing such a tribunal as a jury to determine the liability of a defendant by reference to their own opinions and prejudices as to the propriety of his motives, and partly on the difficulty of ascertaining what those motives really were.¹⁸

The leading case is *Bradford (Mayor of) v. Pickles*,¹⁹ in which the defendant was held not liable for intentionally intercepting, by means of excavations on his own land, the underground water that would otherwise have flowed into the adjoining reservoir of the plaintiffs, although his sole motive in so doing was to coerce the plaintiffs to buy his land at his own price. It was already settled law that the abstraction (as distinct from the pollution) of underground water not flowing in defined channels is not an actionable wrong, even though done intentionally,²⁰ but in the present case an attempt was made to establish an

¹⁵ *Mitchell v. Jenkins* (1833) 5 B. & Ad. 588, 595.

¹⁶ See *Chapman v. Honig* [1963] 2 Q.B. 502, 520.

¹⁷ Below, § 204.

¹⁸ *Allen v. Flood* [1898] A.C. 1, 118-119, 153.

¹⁹ [1895] A.C. 587.

²⁰ *Chasemore v. Richards* (1859) 7 H.L.C. 349, "which shows that if a man has the misfortune to lose his spring by his neighbour digging a well, he must dig his own well deeper": *Ibbetson v. Peat* (1865) 3 H. & C. 644, at 650, *per* Bramwell B. Strangely enough, in *Bradford v. Pickles* the rights arising from the pollution of the water, though clearly established, were not discussed.

exception to this rule when the damage was caused not merely intentionally but also maliciously. This contention, however, was rejected by the House of Lords. Lord Macnaghten said ²¹: "In such a case motives are immaterial. It is the act, not the motive for the act, that must be regarded. If the act apart from the motive gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element." The same principle was affirmed in *Allen v. Flood*.²²

Is reform needed?

This rule has been the subject of much discussion, most of it critical. One eminent authority has gone so far as to say that "Our law has not hesitated to place the seal of its approval upon a theory of the extent of individual rights which can only be described as the consecration of the spirit of unrestricted egoism."²³ A striking example is *Wyld v. Silver*²⁴ in which the plaintiffs obtained a declaration that they and other inhabitants of a parish were entitled to hold a fair on certain land bought by the defendant for building purposes. There was no evidence that a fair had in fact ever been held on this plot, or that the plaintiffs genuinely wished to hold such a fair. Their object was to prevent the defendant erecting the buildings for which he obtained planning permission, but the motives for enforcing an admitted legal right are irrelevant. Again, a landlord who maliciously serves a valid notice to quit on a tenant has committed no civil wrong.²⁵

Yet the limits of the decision in *Bradford v. Pickles* should be noted. The respondent's conduct was not malicious in the sense of being actuated by spite or ill-will towards the appellants. His position was simple. He had something to sell and he did not see why the appellants should not pay the price he asked: it was an attitude with which they, as representatives of one of the great commercial communities of Yorkshire, must have

²¹ [1895] A.C. at 601.

²² [1898] A.C. 1. Cf. *Crofter Hand Woven Harris Tweed Co. v. Veitch* [1942] A.C. 435, 466, 468, 472.

²³ Gutteridge, "Abuse of Rights" (1935) 5 Camb.L.J. 22. Some American courts recognise liability when a lawful act has been done solely out of malice and with intent to injure another: see *Brandt v. Winchell*, 3 N.Y. (2d) 628 (1958).

²⁴ [1963] Ch. 243.

²⁵ *Chapman v. Honig* [1963] 2 Q.B. 502.

been perfectly familiar. "Why should he, he may think, without fee or reward, keep his land as a storeroom for a commodity which the corporation dispense, probably not gratuitously, to the inhabitants of Bradford? He prefers his own interests to the public good. He may be churlish, selfish, and grasping. His conduct may seem shocking to a moral philosopher. But where is the malice? Mr. Pickles has no spite against the people of Bradford. He bears no ill-will to the corporation. They are welcome to his water, and to his land too, if they will pay the price for it."²⁶ In short, his motive was not an improper one in the eyes of the common law, which has never recognised as "an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade."²⁷ Speaking generally, a man has never been required to use his property or conduct his trade under the pain of being obliged to pay damages to his neighbour if a judge and jury later think that what has been done is unreasonable.²⁸ The selfish and anti-social use of resources is a matter which may well be better regulated by some branch of public law than by the law of tort. Thus an indictment for public nuisance or conspiracy may lie against those who use their property or economic power to the detriment of the community²⁹; or powers to inspect, regulate or license may be given to some administrative authority, as under the Town and Country Planning Acts and the Restrictive Practices Act. The doctrine of "Abuse of Rights" recognised by some Continental systems seems too vague to serve as a useful legal principle.

§ 7. Fault

FAULT NECESSARY

Salmond said that a second condition usually demanded by the law for liability in an action of tort was the existence of either

²⁶ [1895] A.C. at 600, *per* Lord Macnaghten.

²⁷ *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.* (1889) 23 Q.B.D. 598, at 615, *per* Bowen L.J.

²⁸ Exceptions may be envisaged (*e.g.*, the duties of those in a common calling, or cases where spite makes the defendant's acts unreasonable and a nuisance), but they are not relevant here.

²⁹ If Mr. Pickles had combined with another their conduct might have been indictable: *Winfield, Tort*, p. 669n.

wrongful intention or culpable negligence on the part of the defendant. He laid great stress upon this element of fault and wrote as follows: "The ultimate purpose of the law in imposing liability on those who do harm to others is to prevent such harm by punishing the doer of it. He is punished by being compelled to make pecuniary compensation to the person injured. It is clear, however, that it is useless to punish any person, either civilly or criminally, unless he acted with a guilty mind. No one can be deterred by a threat of punishment from doing harm which he did not intend and which he did his best to avoid. All that the law can hope to effect by way of penal discipline is to make sure that men will not either wilfully or carelessly break the law and inflict injuries upon others. Pecuniary compensation is not in itself the ultimate object or a sufficient justification of legal liability. It is simply the instrument by which the law fulfils its purpose of penal coercion. When one man does harm to another without any intent to do so and without any negligence, there is in general no reason why he should be compelled to make compensation. The damage done is not thereby in any degree diminished. It has been done, and cannot be undone. By compelling compensation the loss is merely shifted from the shoulders of one man to those of another, but it remains equally heavy. Reason demands that a loss shall lie where it falls, unless some good purpose is to be served by changing its incidence; and in general the only purpose so served is that of punishment for wrongful intent or negligence. There is no more reason why I should insure other persons against the harmful results of my own activities, in the absence of any *mens rea* on my part, than why I should insure them against the inevitable accidents which result to them from the forces of nature independent of human actions altogether."²⁰

Hence Salmond was logically compelled to say²¹ of the decision in *Rylands v. Fletcher*,²² which is founded upon a theory of strict liability: "No decision in the law of torts has done more to prevent the establishment of a simple, uniform, and intelligible system of civil responsibility."

²⁰ 6th ed., pp. 12-13. It is odd that Salmond, who endeavoured to force the law of torts into the strait-jacket of "no liability without fault," should have denied the existence of a law of tort.

²¹ 6th ed., viii.

²² See below, Chap. 14.

FAULT NOT NECESSARY

Three objections may be raised to Salmond's powerful argument. They may be summarised briefly, if cynically, by saying that in England in the nineteen-sixties "the real wrong-doer hardly ever pays for the damage he does. He is usually not worth suing. The payer is either his employer or an insurance company."³³

(1) Fault not an essential element

It seems better to say that fault has never been, and is not today, an essential element in tortious liability.³⁴ There are two main theories of the history in English law of the relations between blameworthiness and civil responsibility. According to Holmes,³⁵ the law began with liability based upon "actual intent and actual personal culpability" and tended, as it grew, to formulate external standards which might subject an individual to liability though there was no fault in him. According to Wigmore,³⁶ the law began by making a man act at his peril and gradually became more moralised until liability was connected with fault. Time out of mind there has been strict liability for innkeepers and common carriers—they are "quasi-insurers."³⁷ It was perhaps only natural that the beginning of the twentieth century should have found Salmond writing as he did in support of the school of Wigmore. For by that date the courts had largely abandoned the distinction between direct and indirect damage so familiar in the medieval common law. Instead the emphasis had shifted to the distinction between intentional and negligent conduct. In particular, the growing importance of

³³ Devlin, *Law and Morals* (Birmingham, 1961), p. 18. See Harris, "The Law of Torts in the Welfare State" (1962) N.Z.L.J. 171 for a useful survey of the arguments against fault, and Jenkyn, Glass and Hughes, "Liability without Fault" (1963) A.L.J. 209 for the opposite view.

³⁴ "As an English lawyer, I can only say that we never heard of it here. Stated as a general proposition, it is contrary to the whole law of trespass, to much of the law of nuisance, to the whole law of defamation, and to the responsibility of principals for their agents": Pollock, "A Plea for Historical Interpretation" (1923) 39 L.Q.R. 164, 167.

³⁵ *Common Law*, Lects. III and IV.

³⁶ Wigmore, "Responsibility for Tortious Acts" (1893) 7 Harv.L.Rev. 315, 383, 441; A.A.L.H., iii, 474. Cf. Ames, "Law and Morals" (1908) 22 Harv.L.Rev. 97, 99; Lectures, 437; Holdsworth, H.E.L., iii, 3rd ed., pp. 375-377; viii, pp. 446-459.

³⁷ *Fletcher v. Rylands* (1865) 3 H. & C. 774, at 793, per Martin B.

the tort of negligence, with its familiar test of asking what a reasonable and prudent man would have done in the circumstances, had brought the question of fault to the forefront. But today we can say that neither view seems to be entirely correct.³⁸ The law has moved in cycles. A period of strict liability, an "unmoral" period, is succeeded by a period of fault liability, a "moral" period, and then the pendulum swings back again. It is the conflict between standardisation and individualisation, between certainty in the law and justice in its application to particular circumstances.

(2) Fault judged by an objective standard

It is clear that to Salmond, with his emphasis on *mens rea*, fault was a matter of personal shortcoming. But it has been well said "that the 'fault' upon which liability may rest is social fault, which may but does not necessarily coincide with personal immorality. The law finds 'fault' in a failure to live up to an ideal standard of conduct which may be beyond the knowledge or capacity of the individual."³⁹ Conversely, it is worth remembering that one who is under no legal liability for damage caused to another may yet think it right and proper to offer some measure of compensation.⁴⁰

(3) Punishment not main object of law of torts

Since he held that wrongful intention or culpable negligence was a condition of civil liability in tort, it is natural that Salmond

³⁸ In *Read v. Lyons* [1947] A.C. 156, at 180, Lord Simonds, after referring to this "age-long conflict of theories which is to be found in every system of law," says that "It will not surprise the students of English law or of anything English to find that between these theories a middle way, a compromise, has been found. . . . For somewhere the line must be drawn unless full rein be given to the doctrine, that a man acts always at his peril, that 'coarse and impolitic idea' as Holmes J. somewhere [*Common Law*, p. 168] calls it."

³⁹ Prosser, *Torts*, pp. 17-18. See further on this topic, below, § 87, and *Workington Dock and Harbour Board v. S.S. Towerfield (Owners)* [1951] A.C. 112, 160; *Gollins v. Gollins* [1964] A.C. 644, 664.

⁴⁰ As Pufendorf (*De Jure*, III, 1.6) remarked: "Should some poverty-stricken man, in a mere accident, be injured by a man of means, it will be seemly in a man of such station to confer some kindness upon the poor man." Contrast the attitude of the successful appellants in *Bolton v. Stone* [1951] A.C. 850 ("The cricket clubs of this country who supported the appeal to the House of Lords have done everything that they can to see that Miss Stone does not suffer financially": 68 L.Q.R. 3), and *Esso Petroleum Ltd. v. Southport Corporation* [1956] A.C. 218 (above, § 1).

should have considered pecuniary compensation, not as in itself the ultimate object or a sufficient justification of legal liability, but as a means of punishment. But this was not the original conception of English law, nor is it generally considered to be the conception of English law today.⁴¹ "The object of a civil inquiry into cause and consequence is to fix liability on some responsible person and to give reparation for damage done, not to inflict punishment for duty disregarded."⁴² The main weakness of Salmond's theory lies in the fact that the compensation payable in civil proceedings is often in no way commensurate with the fault of the defendant. A moment's inadvertence may result in personal injuries for which damages amounting to thousands of pounds can be recovered.⁴³ On the other hand, the grossest negligence may by good fortune produce only slight damage.

It is worth noting that a different principle prevails in admiralty, whereby shipowners who have caused loss or damage to any other vessel by reason of improper navigation are entitled to limit their liability to one thousand gold francs⁴⁴ for each ton of their ship's tonnage.⁴⁵ This is very rough justice, for a small tug towing a large liner can do immense damage.⁴⁶ It is only in criminal proceedings that the sanction may be commensurate with moral guilt.

Function of damages

But although the present emphasis may be on compensation rather than punishment, this does not mean that the latter factor can be ignored entirely. It will always remain important so long as there is power to award aggravated damages against a defendant guilty of outrageous behaviour. It should also be remembered that the law of torts aims not merely to provide compensation for losses which have occurred already, but also seeks to minimise or prevent entirely the occurrence of such losses

⁴¹ But if a plaintiff who has been deprived of all normal senses is entitled to substantial damages, although he can neither enjoy them in his lifetime nor bequeath them by will, as the House of Lords has held in *West (H.) and Son v. Shepherd* [1964] A.C. 326, how can it be said that the aim of torts is compensation rather than punishment?

⁴² *Weld-Blundell v. Stephens* [1920] A.C. 956, at 966.

⁴³ As in *Winkworth v. Hubbard* [1960] 1 Lloyd's Rep. 150.

⁴⁴ £23 13s. 9d. is the sterling equivalent: Merchant Shipping (Limitation of Liability) (Sterling Equivalents) Order, 1958, S.I. 1958 No. 1287.

⁴⁵ Merchant Shipping Act, 1894, s. 501, is the principal Act.

⁴⁶ *The Bramley Moore* [1964] P. 200, 219.

in the future. Hence an award of damages may serve to compensate the plaintiff and also to deter the defendant and others from similar conduct in the future.⁴⁷ An example occurs when an employer is held strictly responsible for breach of a statutory duty designed for the protection of his workmen.

§ 8. The Influence of Insurance⁴⁸

The nineteenth century was a period of moralisation: the twentieth century at one time seemed likely to be characterised by the backward swing of the pendulum. "In the present century an idea came in that liability should be imposed upon those able to pass the loss on to the public—the so-called insurance idea. We were all to bear the losses falling upon any of us as risks of loss in civilised society, and, as means of achieving that just distribution of the burden of loss, the law should impose the loss in the first instance upon those able to pass it on to the public at large through charges for services in the case of public utilities, or price of goods manufactured in case of products of the factory or prices for products raised in agriculture. Lastly, parallel with or else out of the so-called insurance idea a new basis of liability has been increasingly advocated in recent years and is making headway. It looks like an idea of greater ability to bear the loss as a ground of liability."⁴⁹ Thus Lord Justice Denning said⁵⁰ that "Recent legislative and judicial developments show

⁴⁷ See below, § 101.

⁴⁸ The periodical literature is voluminous. A good survey is Prosser, *Torts*, Chap. 16. See also the *Report of the Committee on Absolute Liability* (Wellington, 1963), and Sir John Barry, "Compensation without Litigation" (1964) 37 *Austr.L.J.* 339, both of which have useful bibliographies. A neglected but helpful article is Marriott, "Influence of Insurance upon Acceptance of Legal Liability for Accidents" (1957) *J.R.* 270.

⁴⁹ Pound, *Justice According to Law* (Yale U.P., 1951), p. 11. Pound doubted the morality of these theories. "In such cases Lord Bramwell used to tell the jury a story of the pickpocket who went to a charity sermon and was so moved by the preacher's eloquence that he picked the pockets of every-one within reach and put the contents in the plates. Or, again, he suggested that some would have a judge charge a jury in this fashion: 'Gentlemen, the only question is which do you *really* feel sorry for, the plaintiff or the defendant?': *Social Control Through Law* (Yale U.P., 1942), p. 117. Those who expound the insurance idea often seem to assume that its justice is so apparent that detailed evidence to support it is unnecessary. The careful survey of the law and practice in one particular trade made by Dickerson, *Products Liability and the Food Consumer* (Boston, 1951), suggests that the evidence is not nearly so conclusive. See also Gillam, *Products Liability in the Automobile Industry* (Minneapolis, 1960), and Prosser, *Torts*, Chap. 16.

⁵⁰ *White v. White* [1950] P. 39, at 59.

that the criterion of liability in tort is not so much culpability, but on whom should the risk fall." In other words, the law of torts should deal not so much with the shifting as the distribution of losses typical in an industrial society. Attention should be directed not only to who has the greater capacity to bear the loss, but also to who is in a position to administer it by passing it on to the public by way of increased prices or insurance premiums.⁵¹

It is the logical consequence of this line of argument that some should have been ready to contemplate the abolition of the law of torts, in so far as it attempts to give a remedy in cases of personal injuries arising out of accidents on the highway or in factories, and its replacement by a system of insurance. "The late Swift J., who, at the time of his lamented death, had an unrivalled experience of these cases, said, on more than one occasion, using the vigorous language which characterised him, that, if Parliament allowed such potentially dangerous things as motor-cars to run on the public streets, it ought also to provide that people who were injured by them through no fault of their own should receive compensation, though not necessarily compensation from the driver if the driver has been guilty of no negligence."⁵²

Motor insurance

To some extent Parliament has done so. The Road Traffic Act, 1960, sections 201 and 203, requires every person who uses a vehicle on a road to take out a policy of insurance indemnifying him in respect of any liability⁵³ which may be incurred by him in respect of the death of or bodily injury to any person caused by, or arising out of, the use of the vehicle on a road.⁵⁴ Further,

⁵¹ Fleming, *Torts*, pp. 10-11.

⁵² *Hunter v. Wright* [1938] 2 All E.R. 621, at 625, per Goddard J. See Suzman, "Motor-Vehicle Accidents" (1955) 74 S.A.L.J. 374; Ross Parsons, "Death and Injury on the Roads" (1955) 3 Univ. of W.A. Ann. L. Rev. 201; Leon Green, *Traffic Victims: Tort Law and Insurance*; Friedmann, *Social Change and Legal Institutions*, Chap. 5; Harris, "Compensation for Accidents" (1959) 102 S.J. 729, 749, 765, 783 and note 48 above.

⁵³ This covers liability arising out of an intentional criminal act, e.g., murder or manslaughter. The assured may himself be debarred by public policy from recovering, but a third party is not: *Hardy v. Motor Insurers' Bureau* [1964] 2 Q.B. 745.

⁵⁴ "Use," "vehicle," "road": for the numerous cases, see Preston & Colinvaux, *The Law of Insurance*.

a third person who suffers bodily injury as a result of a tortious act of the assured is, by section 207, given a direct right of action against the insurers. These valuable provisions, which are superior to those in many foreign countries, left one gap—a motorist might have no, or no effective, insurance. This gap was filled by an extra-statutory piece of machinery—a method of law reform characteristic of English life. In 1946 the Motor Insurers' Bureau entered into an agreement⁵⁵ with the Ministry of Transport under which M.I.B. undertook to satisfy unsatisfied judgments in respect of any liability required to be covered by a policy of insurance. It may be asked why those provisions for compulsory third-party insurance, taken together with the benevolent practice⁵⁶ of M.I.B. of satisfying judgments obtained against uninsured drivers,⁵⁷ should not have solved these difficulties. The answer is that the present system was not intended to provide universal compensation but only compulsory cover for negligence. Hence it is a condition precedent to recovery under such a system of liability insurance that a judgment should be obtained against the defendant if liability is contested by his insurance company. Even M.I.B. require the party bringing the proceedings to take all reasonable steps to obtain judgment against all tortfeasors responsible. Hence it may still be necessary to embark on the lengthy and expensive process of a common law trial in order to prove fault.

The same difficulty does not exist in a system of loss insurance such as exists for industrial injuries⁵⁸ in England⁵⁹: the workman recovers benefit from an administrative agency because the accident has happened in the course of the employment and

⁵⁵ Text in Bingham, *Motor Claims Cases*, pp. 658–662, and [1964] 2 Q.B. 778.

⁵⁶ There is no legal liability to the third party who is not privy to the 1946 Agreement: *Fire, Auto and Marine Insurance Co. Ltd. v. Greene* [1964] 2 Q.B. 687.

⁵⁷ The Bureau even makes *ex gratia* payments in the case of a hit-and-run driver, but it will repudiate liability when the accident has been caused in circumstances not legally required to be covered by a policy of insurance—e.g., on private land as distinct from a road: *Crickmar v. Cleavers*, *The Times*, October 8, 1964. This loophole may cause injustice: *Adams v. Andrews* [1964] 2 Lloyd's Rep. 347.

⁵⁸ See below, § 198.

⁵⁹ Or for road accidents in Saskatchewan. No student of this topic should neglect the most helpful pamphlet published by the Government Insurance Office, Regina, Saskatchewan, or the very full *Report of the New Zealand Government Committee* (above, n. 48).

the premiums have been paid to cover just that eventuality. Under a system of liability insurance potential defendants are obliged to insure: under a system of loss insurance potential plaintiffs. Payment is made directly to the injured person and not to an insured who has become legally liable to a third party. A system of insurance has many advantages: society as a whole knows that those who are injured will not be left destitute; the victim is protected from financial ruin; and the employer benefits because "a certain, calculable, and reasonable cost is substituted for the chance of ruinous loss, through liability."⁶⁰ Insurance removes the burden of paying damages from individual defendants and spreads it over the general body of premium-paying policy-holders.⁶¹ Indeed, it is not too much to say that as the vast bulk of tort litigation consists of motor and factory accident cases in which the defendants are insured, the only cases which reach the courts are those which insurance companies for some reason wish to fight.⁶²

The attitude of the courts

But there are cross-currents in these matters. There is some evidence to show that the courts are not as ready to compensate the injured plaintiff as they once seemed. "It does seem to me," Harman J. remarked,⁶³ "that the notion which has grown up that whenever anybody suffers injury he must necessarily be able to get compensation from somebody else must not be encouraged." Lord Goddard C.J. agreed: "I think that that idea is getting far too common. It is not for every injury that a person may sustain in the course of everyday life that he or she can recover compensation; it can only be recovered if that injury is due to the fault of somebody who owes a duty to that person."⁶⁴ In many cases the courts have emphasised that a servant who is

⁶⁰ Fleming James, Jr., "Accident Liability Reconsidered" (1948) 57 Yale L.J. 549, 550. Yet experience shows that those who are most likely to need insurance are least likely to be insured.

⁶¹ *Wise v. Kaye* [1962] 1 Q.B. 638, 670.

⁶² See Marriott (1957) J.R. 270, 278. But Prosser, *Torts*, Chap. 16, after a full survey concludes that the impact of insurance upon torts has been "amazingly slight" (p. 569). *Contra*, Lord Devlin, *Samples of Law-making* (1962), p. 100.

⁶³ *Cooke v. Kent C. C.* (1949) 82 Ll.L.Rep. 828, at 825.

⁶⁴ *Bell v. Travco Hotels Ltd.* [1953] 1 Q.B. 478, at 478. See also *Trevett v. Lee* [1955] 1 W.L.R. 113, 116; *Lister v. Romford Ice Co.* [1956] 2 Q.B. 180, 213.

suing his master for failing to take reasonable care for the safety of the servant must establish fault on the part of the defendant.⁶⁵ Again, "The doctrine of *Rylands v. Fletcher* is properly to be regarded rather as an exception to the general principle that there is no liability without fault than as itself a general rule, and it ought not to be extended readily, even if the extension appears to have a logical foundation."⁶⁶ The rule that an occupier is under no duty to prevent his domestic animals not known to be dangerous from escaping onto the highway has been affirmed.⁶⁷ Again, in *Bolton v. Stone*,⁶⁸ the House unanimously affirmed that in an action of negligence the probability or likelihood of injury, as distinct from its possibility, must be shown.

Law and social change

It seems that an explanation of the courts' insistence on the proof of fault in actions for personal injuries may be found in the changing social and economic circumstances of England. Before 1945 a workman who had suffered injuries in the course of his employment was subject to certain disabilities: (i) he was obliged to elect between his common law claim and his statutory right to compensation; (ii) he might be defeated by the defences of common employment or contributory negligence. Hence there was undoubtedly a tendency to interpret the law in the way most favourable to the injured workman. In particular the personal duty which a master owes to take reasonable care for his servant's safety was extended so far as to suggest that the master was responsible for the defaults of anyone who had supplied him with carelessly manufactured tools. This heresy has now been

⁶⁵ See below, § 199.

⁶⁶ *Read v. J. Lyons & Co.* [1945] K.B. 216, at 246, *per du Parcq L.J.* The whole tenor of the speeches in the H.L. is to the same effect. In the preface to the tenth edition Stallybrass wrote (p. ix) as follows: "The judgments of Scott and du Parcq L.J.J. in this case are interesting as showing a resurrection of a general principle of no liability without fault. The speeches in the House of Lords in *Sedleigh-Denfield v. O'Callaghan* may be other straws in the same wind. Should this wind blow hard the sixth edition of Salmond's *Torts* will give a truer picture of the law than the tenth, and Sir John himself will be revenged upon his editor."

⁶⁷ *Searle v. Wallbank* [1947] A.C. 341. But in *Wormald v. Cole* [1954] 1 Q.B. 614 the C.A. (Lord Goddard C.J., Singleton and Hodson L.J.J.) held (contrary to the recommendation of Lord Goddard's Committee on the Law of Civil Liability for Damage Done by Animals (Cmd. 8746, 1953)) that an occupier could recover damages for personal injuries in cattle-trespass.

⁶⁸ [1951] A.C. 850.

firmly rebutted both in England⁶⁹ and in Scotland.⁷⁰ There is now no reason for treating an injured workman more favourably than any other plaintiff.⁷¹ In particular, it has been emphatically stated that a court should not pay any attention to the fact that an employer is probably insured.⁷²

In other branches of the law the same tendency to insist on fault⁷³ appears. Inevitable accident has been held to be a good defence to an action for trespass to chattels,⁷⁴ and it seems to be generally accepted that it is a defence to an action for trespass to the person⁷⁵; no encouragement has been given to the doctrine that a defendant is liable for all the direct consequences of a negligent act⁷⁶; and there has even been some indication that the notion of fault has influenced decisions in actions for breach of absolute statutory duty.⁷⁷ Finally, Parliament in the Defamation Act, 1952, has certainly not intended to ease the path of the plaintiff in an action for libel or slander.

§ 9. Liability without Fault

In certain cases, liability is independent of intention or negligence. There are several examples of this. Liability in libel does not depend on the intention of the defamer, but on the fact of defamation; so too there is strict liability for damage done by a wild animal, or by the escape of dangerous things accumulated for some non-natural purpose (the rule in *Rylands v. Fletcher*); again, liability is strict when one is vicariously responsible for the acts of another. In cases such as these the security of the particular interest of the plaintiff is predominant over the defendant's interest in freedom of action. It is a mistake, however,

⁶⁹ *Davie v. New Merton Board Mills Ltd.* [1959] A.C. 604.

⁷⁰ *Sullivan v. Gallagher and Craig*, 1959 S.C. 243.

⁷¹ See *Knight v. Glen Line Ltd.* [1954] 2 Lloyd's Rep. 392; *Chattaway v. Maltby (T.F.) Ltd.* [1954] 2 Lloyd's Rep. 425. See also below, § 199.

⁷² *Davie v. New Merton Board Mills Ltd.* [1959] A.C. 604, at 627, per Lord Simonds.

⁷³ *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164 (careless statements); *Best v. Samuel Fox & Co.* [1952] A.C. 716 (careless act depriving wife of husband's consortium).

⁷⁴ *National Coal Board v. Evans & Co.* [1951] 2 K.B. 861.

⁷⁵ Below, § 52. But in *Morris v. Marsden* [1952] 1 All E.R. 925 insanity was held to be no excuse for assault and battery.

⁷⁶ See §§ 205-207.

⁷⁷ Below, § 101. The courts also stress the necessity for *mens rea* in statutory offences in criminal law: *Reynolds v. G. H. Austin Ltd.* [1961] 2 K.B. 135.

to think of the predominance as complete. In appropriate cases defences such as act of God or act of a third party are available. Liability may be strict but it is never absolute.⁷⁸

Salmond also included under this heading two other matters: inevitable mistake and inevitable accident.

(1) Inevitable mistake

Inevitable mistake⁷⁹ is commonly no defence against civil liability. Any act of wilful interference with the property, person, reputation, liberty, or other right of another on a supposed justification is done at the doer's peril; and if the justification does not in truth exist, a belief in its existence, however honest and reasonable, is no defence. It makes no difference in such a case whether the mistake is one of fact or one of law. Thus an auctioneer who sells and delivers goods on behalf of a customer having no title to them is liable for their value to the true owner, even though he so acted in good faith and without negligence, and even though he has already paid the proceeds of the sale to his own customer.⁸⁰

To this general principle of absolute liability for mistake the law recognises some exceptions, there being certain cases in which it would work such hardship or interfere so seriously with the exercise of lawful activities that it is necessary to relax it. Thus the mistaken prosecution of an innocent man is not in itself an actionable wrong; for such a rule would effectually impede the administration of the criminal law. A prosecutor incurs no liability unless he acted both maliciously and without reasonable cause.⁸¹ So the mistaken arrest of an innocent man on suspicion of felony is not actionable, if the felony has actually been committed, and if there is reasonable ground for believing that the person arrested is guilty of it.⁸²

(2) Inevitable accident

Inevitable mistake must be distinguished from inevitable accident. The plea of inevitable mistake is that, although the

⁷⁸ Winfield, *Tort*, p. 19.

⁷⁹ Landon found this term "unintelligible": 61 L.Q.R. 205.

⁸⁰ *Consolidated Co. v. Curtis* [1892] 1 Q.B. 495.

⁸¹ See below, § 171.

⁸² See below, § 52.

act and its consequences were intended, the defendant acted under an erroneous belief, formed on reasonable grounds, that some circumstances existed which justified him. The plea of inevitable accident is that the consequences complained of as a wrong were not intended by the defendant and could not have been foreseen and avoided by the exercise of reasonable care and skill.⁸³

An accident in its popular sense is any unexpected injury resulting from any unlooked-for mishap or occurrence.⁸⁴ In law a happening is only regarded as an accident "if it is one out of the ordinary course of things, something so unusual as not to be looked for by a person of ordinary prudence."⁸⁵ So an ordinary fall of snow is not an accident, but only an incident which happens in the ordinary course of things.⁸⁶ One form of inevitable accident is that which is due to an act of God,⁸⁷ another—from the point of view of the defendant—may possibly occur in the case of the unforeseeable act of a third party.⁸⁸

There is no general principle that inevitable accident is a good defence. In actions of trespass it is now settled (after some hesitation) that it may be pleaded as a defence; but it will probably succeed only if the defendant had in truth no control over the act which caused the damage.⁸⁹ In torts of strict liability (e.g., under the rule in *Rylands v. Fletcher*) only the special form of inevitable accident known as act of God (or possibly the uncontrollable act of a third party) affords a good defence. In actions in which negligence has to be proved by the plaintiff, the plea of inevitable accident is really tantamount to saying that the defendant has not failed to observe the standard of care required of him. Hence a court may well prefer to say that the defendant was not negligent rather than that he has affirmatively proved inevitable accident.⁹⁰ So in an action of negligence it is not necessary for the defendant to show that the accident was

⁸³ *McBride v. Stitt* [1944] N.I. 7, at 10.

⁸⁴ *Fenton v. Thorley & Co.* [1903] A.C. 443, at 451.

⁸⁵ *Makin Ltd. v. L. & N. E. Ry.* [1943] 1 All E.R. 362, at 364–365, per Greene M.R.

⁸⁶ *Fenwick v. Schmalz* (1868) L.R. 3 C.P. 313, 316.

⁸⁷ *Makin's Case* [1943] 1 K.B. 467, 475, 478.

⁸⁸ *Ibid.* [1943] 1 All E.R. 362, 367.

⁸⁹ See below, § 52.

⁹⁰ *Browne v. De Luxe Car Services Ltd.* [1941] 1 K.B. 549, 552; *McBride v. Stitt* [1944] N.I. 7, 14; *Aubrey v. Harris* (1957) 7 D.L.R. (2d) 545.

inevitable in the strictest sense—that is to say, incapable of being prevented at all, or only by the exercise of extraordinary care and skill. If a man drives a motor-car, and in spite of the exercise of all reasonable care on his part an accident happens, he may plead that it was due to inevitable accident; and it will be no answer to this plea to prove that if he had altogether refrained from those dangerous forms of activity it would not have ensued.⁹¹

Finally, a point of pleading should be noted—in an action of trespass, inevitable accident must be specifically pleaded; but in an action of negligence, evidence of inevitable accident, or the negligence of a third party, may be given when a general denial is pleaded.⁹² It is then in substance not a separate defence but merely a denial of negligence.⁹³

§ 10. Province and Function of the Law of Torts

The preceding discussion has enabled us to form some conclusions. First, the law of torts is not a static body of rules, but is capable of alteration to meet the needs of a changing society. One word of warning should be added. It is often rather hastily assumed that any desirable alteration in the law of torts must result in the expansion of the field of liability. But social needs may require contraction as well as expansion.⁹⁴ Thus it can hardly be doubted that the courts were justified in refusing to introduce new heads of tortious liability to enable a witness to be sued for perjury,⁹⁵ or conspiracy to defame.⁹⁶ Secondly, it is not possible to find a general formula or criterion which will at once explain all the cases in which liability has been imposed in the past and also furnish a guide for the decision of doubtful cases in the future. It is now widely believed that the decision of a court to impose liability in tort may be influenced by a number of factors, of which one or more may be of decisive importance in the particular case, and that the most profitable

⁹¹ *Cutler v. United Diaries* [1933] 2 K.B. 297, 305.

⁹² *MacKnight v. McLoughlin* [1963] N.I. 34. See an admirable note on this case in (1963) 15 N.I.L.Q. 571.

⁹³ *Jockel v. Jockel* (1963) S.R. (N.S.W.) 230.

⁹⁴ See Lord MacDermott C.J. in *Gallagher v. McDowell Ltd.* [1961] N.I. 26, 44.

⁹⁵ *Hargreaves v. Bretherton* [1959] 1 Q.B. 45.

⁹⁶ *Marrinan v. Vibart* [1963] 1 Q.B. 528.

inquiry is likely to be into the nature and significance of these factors. "It would be possible to approach the law of torts solely from the standpoint of the nature of the defendant's conduct, namely, whether it was intentional, negligent, or neither. This, however, would not place due emphasis on the particular claim or interest for which the plaintiff was seeking protection. Both must be considered together."⁹⁷ We have already seen something of the scale of values which the common law adopts in the task of adjusting the claims between the conflict of interests in any particular case. Some interests are thought worthy of a higher degree of protection than others. Thirdly, it should be remembered that other factors besides the two which we have mentioned may be relevant. We have already had examples of four such factors: (i) historical development; (ii) vengeance; (iii) deterrence; (iv) ability to bear the loss. A fifth factor is the economic and social background of the case. So in the atmosphere of the welfare state the doctrine of common employment withered away, and the action by a master for the loss of the services of his servant is regarded with increasing suspicion.⁹⁸

Future Developments

Finally, it should be noted that at the present day the avenue to the development of the law is the action on the case for negligence. Strict liability in tort has fallen into some disfavour, and it is unlikely that any new torts based upon the intentional conduct of the defendant remain to be discovered,⁹⁹ though the re-affirmation of the existence of the obscure and unfamiliar tort of intimidation¹ has caused great discussion. But negligence, ever since its recognition by the House of Lords as a distinct tort, has come to occupy a predominant position in the law. It is in this field that the possibilities for expansion are most evident. When relationships come before the courts which have not previously been the subject of judicial decision the court is unfettered in its power to grant or refuse a remedy for

⁹⁷ Wright, *Cases on the Law of Torts*, p. 3.

⁹⁸ See Pound, "The Economic Interpretation and the Law of Torts" (1940) 58 Harv.L.Rev. 365.

⁹⁹ A possible exception can be found in the still (judicially) unrecognised tort of interference with privacy.

¹ *Rookes v. Barnard* [1964] A.C. 1129.

negligence. The action on the case for negligence has no limits set upon its territory, save by previous decisions upon such specific relationships as have come before the courts.² The choice will of course be made after a consideration of such of the factors already mentioned as may be relevant in the particular case.

Conclusion

The safest conclusion seems to be that, although we have not yet discovered any general principle of liability, the courts, when they are not fettered by any precedent, today have a bias towards holding that, when one man has intentionally or negligently caused damage to another, he shall recompense him. In consequence, as the law develops we are moving in the direction of a general principle of liability. As one learned author has said: "Perhaps the widest generalisation which can be made is that compensation should be granted for harm caused by the defendant to an interest of the plaintiff, to the extent that this is consistent with current ideas of justice. This formula results from the conflict between the injured plaintiff's interest in security and the defendant's interest in freedom of action. Since different interests have different values, greater protection against damageable interference is afforded to some of the plaintiff's interests than to others; the rule in the particular case is the resultant of an evaluation of the necessity for protecting a particular interest of the plaintiff and of the value to the community of the defendant's type of conduct."³

² These two sentences were cited by Rich J. (dissenting) in *Victoria Park Racing, etc., Co. Ltd. v. Taylor* (1937) 58 C.L.R. 479. As Lord Radcliffe said in *Lister v. Romford Ice Co.* [1957] A.C. 555, at 591-592: "No one really doubts that the common law is a body of law which develops in process of time in response to the development of the society in which it rules. Its movement may not be perceptible at any distinct point of time, nor can we always say how it gets from one point to another, but I do not think that, for all that, we need abandon the conviction of Galileo that somehow, by some means, there is a movement that takes place."

³ Seavey, "*Candler v. Crane, Christmas & Co.*" (1951) 67 L.Q.R. 466, 469.

MISCELLANEOUS DEFENCES

§ 11. Necessity ¹

In some cases even damage intentionally done may not involve the defendant in liability when he is acting under necessity to prevent a greater evil. The precise limits of the defence are not clear, for it has affinities with certain other defences, such as act of God, self-help, duress, or inevitable accident. It is distinguishable from self-defence on the ground that this presupposes that the plaintiff is *prima facie* a wrongdoer: the defence of necessity contemplates the infliction of harm on an innocent plaintiff.² The defence, if it exists, enables a defendant to escape liability for the intentional³ interference with the security of another's person⁴ or property on the ground that the acts complained of were necessary to prevent greater damage to the commonwealth or to another or to the defendant himself, or to their or his property. The use of the term necessity serves to conceal the fact that the defendant always has a choice between two evils. Here, as elsewhere in the law of torts, a balance has to be struck between competing sets of values and no more can be done here than to indicate the factors relevant to such a choice. So there is some authority that the subject as well as the Crown has a right and a duty at common law to justify a trespass or other tort on the ground of necessity in the defence of the realm, but such a right has been said to be obsolescent. "No man now, without

¹ See Bohlen, "Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality," (1926) 39 Harv.L.Rev. 307; Williams, "The Defence of Necessity" [1953] C.L.P. 216; Treitel, "Agency of Necessity" (1954) 3 Univ.of W.A. Ann.L.Rev. 1; Austin, "A Plea for Excuses" (1956) 57 Proc.Arist.Soc. 1.

² Street, *Torts*, p. 81. But if A so parks his car that B cannot move his, would not B be justified in breaking A's window to release the brake? See *Proudman v. Allen* [1954] S.A.S.R. 386.

³ It is inconceivable that the careless invasion of another's interests should be defensible on the ground of necessity.

⁴ Examples of this are rare: our law does not recognise "protective custody": see below, § 50. *Gregson v. Gilbert* (1783) 3 Dougl. 232 (slaves thrown overboard as water running short) is hardly law today. But see *Leigh v. Gladstone* (1909) 26 T.L.R. 139 (forcible feeding of hunger-striker).

risking an action against him in the courts, could pull down his neighbour's house to prevent the fire spreading to his own; he would be told that he ought to have dialled 999 and summoned the local fire brigade." ⁵

Again, it seems plain that "the safety of human lives belongs to a different scale of values from the safety of property. The two are beyond comparison and the necessity for saving life has at all times been considered a proper ground for inflicting such damage as may be necessary upon another's property." ⁶ When the defendant has acted in protection of a private rather than a public interest it seems that the law was once stricter than it now is. "For the rule that the property in question must be actually under attack has been substituted the more generous rule that it must be in real or imminent danger; and for the absolute criterion that the act of trespass must be shown—in the light of subsequent events—to have been necessary for the preservation of the property has been substituted the more relative standard of reasonable necessity, *viz.*, that any reasonable man would, in the circumstances of the case, have concluded that there was no alternative to the act of trespass if the property endangered was to be preserved." ⁷

Thus in *Cope v. Sharpe* ⁸ the defendant committed certain acts of trespass on the plaintiff's land in order to prevent the spread of heath-fire to land over which the defendant's master had shooting rights.⁹ It was shown that the fire never in fact damaged the property of the defendant's master and would not

⁵ *Burmah Oil Co. v. Lord Advocate* [1965] A.C. 75, at 165, *per* Lord Upjohn. Note that the other law lords were not so definite. But it is not permissible for the driver of a fire-engine to ignore traffic signals: *Ward v. L. C. C.* [1938] 2 All E.R. 841. The well-established right of a passenger upon a public highway, if it is foundrous, to go upon adjoining land, may illustrate self-help rather than necessity.

⁶ *Southport Corporation v. Esso Petroleum Ltd.* [1953] 3 W.L.R. 778, at 779, *per* Devlin J. On appeal, see Earl Jowitt and Lord Radcliffe in [1956] A.C. 218, 285, 242.

⁷ *Cresswell v. Sirl* [1948] 1 K.B. 241, at 247, *per* Scott L.J. For criticism of the phrase "reasonably necessary" see *Re Naylor Benson Mining Co.* [1950] Ch. 567, 575.

⁸ [1912] 1 K.B. 496. In this case Kennedy L.J. pointed out (at 509) that "reasonableness" includes a comparison of the value of that which is destroyed with that which it is sought to preserve.

⁹ Note that the defendant was not a mere volunteer, as he was in *Carter v. Thomas* [1893] 1 Q.B. 678 (well-intentioned entrant on another's premises to extinguish a fire at which firemen were already working held a trespasser).

have done so even if the preventive measures had not been taken. The Court of Appeal, however, held that the defendant was entitled to succeed: the risk to his master's property had been real and imminent, and a reasonable person, placed in the defendant's position, would have acted as he had done. It has since been held that the principle laid down in *Cope v. Sharpe* affords a general justification for acts of trespass.¹⁰ Hence one who, in defence of property¹¹ which is in real or imminent danger, shoots or otherwise destroys an animal in the possession or ownership of another¹² has a good defence if he can show that there was no other practicable means open to him of stopping or preventing the renewal of the attack, or that he acted reasonably in regarding what he did as necessary.¹³ It is uncertain whether the defence of necessity is available if the defendant has acted in good faith otherwise than for the protection of property—e.g., if out of mercy he kills a dog which has been run over,¹⁴ but on principle the defendant should be protected. But the defence of necessity is not in general favoured by the courts.¹⁵ "The good samaritan is a character unesteemed by the English law."¹⁶ It is important that people should not interfere with the person or property of others without a due sense of responsibility, particularly as the obligation to pay compensation for any damage done appears to be limited to the Crown acting under its prerogative.¹⁷ In any case, the defence of necessity is not available if the predicament in which the defendant found himself was brought about by his own negligence.¹⁸

¹⁰ *Cresswell v. Sirl* [1948] 1 K.B. 241, 248.

¹¹ Whether his own or another's: *Workman v. Cowper* [1961] 2 Q.B. 143.

¹² Neither a person owning sporting rights nor the landowner has any property in wild game: *Gott v. Measures* [1948] 1 K.B. 234, 239. But see 64 L.Q.R. 38.

¹³ *Cresswell v. Sirl* [1948] 1 K.B. 241 (dog); *Hamps v. Darby* [1948] 2 K.B. 311 (homing pigeons); *Goodway v. Becher* [1951] 2 All E.R. 349 (dog). The Goddard Committee (Cmd. 8746, para. 7) favoured giving wider powers to the landowner.

¹⁴ See *Workman v. Cowper* [1961] 2 Q.B. 143.

¹⁵ So that when it was attempted to defend a nuisance caused by noisy building operations on the ground that they were necessary to save time and money, Bennett J. said: "I cannot help being reminded of a line I remember in *Paradise Lost*: 'So spake the Fiend, and with necessity, the tyrant's plea, excused his devilish deeds.'" *Andreae v. Selfridge & Co., Ltd.* [1936] 2 All E.R. 1413, at 1422.

¹⁶ Lord Devlin, *Samples of Lawmaking* (1962), p. 90.

¹⁷ *Burmah Oil Co. Ltd. v. Lord Advocate* [1965] A.C. 75.

¹⁸ *Southport Corporation v. Esso Petroleum Ltd.* [1954] 2 Q.B. 182, 185, 199.

§ 12. Volenti non fit injuria¹⁹

This maxim had its origin in the process by which Roman Law validated the act of a free citizen selling himself into slavery. In the nineteenth century it somehow found its way into the law of torts, in which it has a double application to intentional and accidental harms.

(1) Intentional harms

No act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it: *Volenti non fit injuria*. No man can enforce a right which he has voluntarily waived or abandoned.²⁰ The maxim applies to intentional acts which would otherwise be tortious: consent, for example, to an entry on land or goods²¹ which would otherwise be a trespass, consent to physical harm which would otherwise be an assault, as in the case of involuntary contacts in a crowded street,²² or a boxing match or a surgical operation,²³ provided that what is done is within the scope of the consent. What is the position if a surgeon operates on a person who is unable to give consent, but in need of treatment? There is no clear English authority on the point,²⁴ but in practice the English medical profession extract written consents from parents or other relatives. In an emergency, such as a traffic accident, the law should in principle allow the defence of necessity²⁵ or implied consent²⁶ to an action for

¹⁹ See Bohlen, "Voluntary Assumption of Risk," *Studies*, 441; "Consent as affecting Civil Liability for Breaches of the Peace," *Studies*, 577; Gordon, "Wrong turns in the *volens* cases" (1945) 61 L.Q.R. 140; Williams, *Joint Torts and Contributory Negligence*, Chap. 12; Fleming James, Jr., "Assumption of Risk" (1952) 61 Yale L.J. 141; Morison and Kolts, "The Suppressed Reference in the Volens Principle" (1953) 1 Sydney L.R. 77; Payne, "Assumption of Risk and Negligence" (1957) 35 Can.Bar Rev. 950, and the interesting discussion in Restatement of the Law Second, Tentative Draft No. 9.

²⁰ These words were cited with approval by Slessor L.J. in *Chapman v. Ellesmere* [1932] 2 K.B. 431, 463.

²¹ *Leitch v. Leydon* [1931] A.C. 90, 109.

²² See below, § 49.

²³ *Bravery v. Bravery* [1954] 1 W.L.R. 1169.

²⁴ But in *Banbury v. Bank of Montreal* [1918] A.C. 626, 689, Lord Atkinson thought it was settled that a doctor owed a duty of care in such a case.

²⁵ See above, § 11.

²⁶ Prosser, *Torts*, p. 104. See also the full discussion by Lord Devlin, *Samples of Lawmaking* (1962), pp. 83-94.

assault brought by an ungrateful patient, but the medical profession doubt whether it does.²⁷

(2) Accidental harms

The maxim applies, in the second place, to consent to run the risk of accidental harm which would otherwise be actionable as due to the negligence of him who caused it. There is some authority for saying that the maxim means a waiver by the plaintiff of an admitted breach of duty, but the better view is that consent here means the agreement of the plaintiff, express or implied, to exempt the defendant from the duty of care which he would otherwise have owed.²⁸ It follows that if the defendant owes to the plaintiff no duty of care at all, no question of *volenti non fit injuria* arises. The Court of Appeal has held that spectators at games and sporting events assume the risk of any harm caused by the players unless it results from intentional or reckless conduct.²⁹ In such a case the players do not apparently owe to the spectators the ordinary duty of care. But if the person sued is the occupier of the premises or the promoter of the game apparently a duty of care does exist.³⁰

If there is an express agreement to exempt the defendant from the consequences which would ordinarily follow from his negligent act no difficulty arises, except that it should be remembered that such contracts are construed strictly as against the party claiming the benefit of the exemption,³¹ and that sometimes they are prohibited by statute.³² Otherwise it is in each case a question of

²⁷ The editor has been informed that the lecturers on medical jurisprudence in two British universities advise their students never to render first-aid at a traffic accident in case they should be sued for negligence.

²⁸ This sentence was cited by Turner J. in *Morrison v. Union Steamship Co. Ltd.* [1964] N.Z.L.R. 468, 478. It is sometimes said that the law of negligence assumes the principle of *volenti* to be inapplicable: *Dann v. Hamilton* [1969] 1 K.B. 509, 517; *Wooldridge v. Sumner* [1963] 2 Q.B. 43, 69. This means no more than that the duty of care persists beyond the specific conduct or state of things which is the subject of consent: *Insurance Commissioner v. Joyce* (1948) 77 C.L.R. 89, 56. See James, *Torts*, p. 35.

²⁹ *Wooldridge v. Sumner* [1963] 2 Q.B. 43. All previous decisions on games must be reconsidered in the light of this case, but it is open to serious criticism both on the law and the facts: see Goodhart, Note, 78 L.Q.R. 490.

³⁰ See above, § 3.

³¹ See *Wooldridge v. Sumner* [1963] 2 Q.B. 43, 66.

³² The Road Traffic Act, 1960, s. 161, provides that any contract for the conveyance of a passenger in a public service vehicle shall be void so far as it purports to restrict liability for death or bodily injury to him. A

fact whether a real consent to the assumption of the risk without compensation can be deduced from all the circumstances of the case.³³ The issue is whether the plaintiff has consented to run the risk at his own expense.³⁴ For the issue is not whether the plaintiff voluntarily and rashly exposed himself to the risk of injury, but whether he agreed that if injury befell him, the loss should be on him and not on the defendant.³⁵ The true question in every case is: did the plaintiff give a real consent to the assumption of the risk without compensation; did the consent really absolve the defendant from the duty to take care? ³⁶ It is not necessary that his consent should have been given in a formal contract under seal or supported by consideration: any acts or statements from which free consent can be deduced will be sufficient for the purposes of the law of torts.³⁷

Three problems have often served to obscure the true principle. First, many of the cases in which the maxim has been considered have been cases of master and servant, in which special considerations apply ³⁸—so much so that the defence has almost disappeared in such cases,³⁹ unless the claim is for breach of a statutory duty imposed on a fellow-workman.⁴⁰ The employer is entitled to the benefit of such an implied consent by the plaintiff workman.⁴¹ Secondly, the traditional form of the question (*i.e.*, did the plaintiff assume the risk?) tends to disguise the fact that the defendant is setting up acceptance of the risk as a term of the undertaking, the burden of proof of which lies on him. The question really is: can the defendant reasonably be heard to say, as an inference from the facts, that the risk of injury from his own misconduct was required by him to be, and was in fact,

similar provision is contained in the Transport Act, 1962, s. 43 (7), in relation to carriage by the Railways Board and the London Transport Board.

³³ *Merrington v. Ironbridge Metal Works, Ltd.* [1952] 2 All E.R. 1101, 1108; Lord Wright, 2 Univ. of W.A. Ann.L.Rev. 546, 558-559.

³⁴ *Kelly v. Farrans Ltd.* [1954] N.I. 41, 45.

³⁵ *Car & General Insurance Corporation Ltd. v. Seymour* [1956] 2 D.L.R. 369, 371-372; *Wilson v. Darling Island, etc., Co.* (1955) 95 C.L.R. 48, 82.

³⁶ This sentence was cited with approval by Kellock J. in *Seymour's Case* [1956] 2 D.L.R. at 378, and by Cartwright J. in *Lehnert v. Stein* (1962) 36 D.L.R. (2d) 159, at 164.

³⁷ *Wilson v. Darling Island, etc., Co.* (1955) 95 C.L.R. 48, 82; *Morrison v. Union Steamship Co. Ltd.* [1964] N.Z.L.R. 468.

³⁸ This sentence was cited by Hallett J. in *Merrington v. Ironbridge Metal Works Ltd.* [1952] 2 All E.R. 1101, 1108.

³⁹ *I.C.I. Ltd. v. Shatwell* [1964] 3 W.L.R. 829, 849.

⁴⁰ As in *I.C.I. Ltd. v. Shatwell* [1964] 3 W.L.R. 829.

⁴¹ *I.C.I. Ltd. v. Shatwell* [1964] 3 W.L.R. 829, 351.

accepted by the plaintiff as such a term? ⁴² Thirdly, the maxim may extend to a bargain to accept *future* negligent acts on the part of the defendant—a licence to commit a tort, in other words. Such a bargain or licence has been held to be capable of arising in cases of passengers in vehicles accepting lifts from drunken drivers,⁴³ but the courts lean against such an interpretation,⁴⁴ for if the act relied upon to establish consent precedes the negligence, the plaintiff is unlikely to have acquired full knowledge of the extent as well as the nature of the risk. Still, the defence is certainly available in theory in such a case, for the essence of it is not so much assent to the infliction of injury as assumption of the risk of it.⁴⁵

Highway accidents

One application of the principle that a man cannot recover damages if he has consented to run the risk of accidental harm is to be found in the case of accidents on the highway. In *Holmes v. Mather* ⁴⁶ the plaintiff was knocked down on the highway by the defendant's horses which were being driven with all proper care. The defendant was held not liable, and Bramwell B. said ⁴⁷: "For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid." In other words, he who uses a highway consents to run the risk of pure accidents, but not the risk of injury due to other persons' carelessness. It is for this reason that although the injury is direct and forcible and therefore *prima facie* a trespass to the person the plaintiff has to prove negligence in order to succeed. This principle was laid down more by a series of dicta ⁴⁸ and the tacit approval of the profession from the mid-nineteenth century onwards than by any definite decision.⁴⁹ The same principle is extended to those

⁴² *Seymour's Case* [1956] 2 D.L.R. 369, 371.

⁴³ *Dann v. Hamilton* [1939] 1 K.B. 509.

⁴⁴ *Turner v. Union Steamship Co. Ltd.* [1964] N.Z.L.R. 468, 477-479, 482.

⁴⁵ Fleming, *Torts*, p. 253.

⁴⁶ (1875) L.R. 10 Ex. 261. See also below, § 52.

⁴⁷ L.R. 10 Ex. at 267.

⁴⁸ Per Lord Blackburn in *Fletcher v. Rylands* (1866) L.R. 1 Ex. 265, 286-287, and in *River Wear Commissioners v. Adamson* (1877) 2 App.Cas. 743, 767.

⁴⁹ The pre-1852 running-down cases are listed in Harari, *The Place of Negligence in the Law of Torts* (Sydney, 1962), Appendix A.

who own property adjoining a highway. They must submit to the dangers incident to the ordinary use of the highway for purposes of traffic, so long as they are not aggravated by the negligence of him whom they seek to make liable for them.⁵⁰ So in *Tillett v. Ward*⁵¹ the defendant drove cattle along the highway, and was held not liable for damage done by the entrance of an ox through the open doorway of an ironmonger's shop. So also those going to a market must take the ordinary risks of escaping beasts.⁵²

Drunken drivers

One particular difficulty arises when injuries are suffered by a passenger in a motor-car driven by an intoxicated person. In *Dann v. Hamilton*,⁵³ the plaintiff, who voluntarily chose to travel by motor-car though she knew the driver was under the influence of drink and though she could have made her journey by omnibus, was injured in an accident caused by the driver's drunkenness.⁵⁴ The defence of *volenti* was held to be capable of arising out of the relationship of the parties, although the plaintiff

⁵⁰ *Esso Petroleum Co. Ltd. v. Southport Corporation* [1956] A.C. 218, 244.

⁵¹ (1882) 10 Q.B.D. 17. Williams, *Animals*, pp. 369-376, states that non-liability for the trespass of cattle escaping from a highway is an instance of inevitable accident as a defence, and therefore that there is no liability however far such cattle wander from the highway. If the view adopted above is correct, the defence would only be available against those whose land is sufficiently near to the highway to justify the inference that they have accepted the risk of such an escape.

⁵² *Brackenborough v. Spalding U. D. C.* [1942] A.C. 310, 330.

⁵³ [1939] 1 K.B. 509, 517-518. Possibly the plaintiff could have succeeded on the ground that her consent to the criminal act of driving under the influence of drink was void, but Asquith J. was doubtful of this (at p. 519). The case is criticised by Goodhart, 55 L.Q.R. 184, and on similar facts the High Court of Australia has come to a different conclusion: *Insurance Commissioner v. Joyce* (1948) 77 C.L.R. 39; *Roggenkamp v. Bennett* (1950) 80 C.L.R. 292. But the decision is defended in *Car & General Insurance Corporation Ltd. v. Scymour* (1956) 2 D.L.R. (2d) 369. It may also be justified on the ground that the consent of the plaintiff did not release the defendant completely from his duty to take care towards her, but only from the duty to take the care of a reasonable man: Burnett, Note, 38 Can. Bar Rev. 107.

⁵⁴ Although the defence of contributory negligence was not raised (69 L.Q.R. 317), it might be available on such facts: *Slater v. Clay Cross Co. Ltd.* [1956] 2 Q.B. 264. But it is difficult to see that in such a case the damage is caused partly by the fault of the plaintiff himself: the cause of the accident will be the same whether the plaintiff knew of the driver's drunkenness or not: *Bankhead v. McCarthy*, 1963 S.L.T. 144. *Contra, Dawrant v. Nutt* [1961] 1 W.L.R. 253, but as Pollock would have said, this case "cannot be law as reported."

succeeded on the facts. But today the courts lean against the defence of *volenti* when it is sought to deduce or infer a licence in advance to commit a tort.⁵⁵ Something like a contract must probably be shown. It is certainly clear that a passenger is not necessarily deprived of his remedy if he travels with a driver who is known to have driven negligently in the past.⁵⁶

§ 13. Knowledge not Consent

Mere knowledge of an impending wrongful act, or of the existence of a wrongfully caused danger, does not in itself amount to consent, even though no attempt is made by the plaintiff to prevent or avoid that act or danger. Consent involves an express or implied agreement that the act may be rightfully done or the danger rightfully caused. The maxim of the law is *volenti non fit injuria, not scienti non fit injuria*.⁵⁷ Thus in *Brunswick (Duke of) v. Harmer*⁵⁸ the plaintiff successfully sued for libel, although the only publication was the sale of a copy of the libellous paper to a person whom the plaintiff himself had instructed to buy it for the very purpose of enabling an action to be brought. The same principle applies to the other branch of the maxim *volenti non fit injuria*, relating to the consent to run the risk of accidental harm. Accordingly a servant who knowingly works on dangerous premises or with defective plant or tools is not for that reason *ipso facto* debarred from suing his employer when an accident happens. The question is not whether he knew of the danger, but whether in fact he agreed to run the risk, in the sense that he exempted his employer from his duty not to create the danger, and agreed that if injury happened the loss should be on him and not on his employer. Knowledge of the danger may be evidence of such an agreement, but it is nothing more.⁵⁹

This principle was finally established by the House of Lords in the leading case of *Smith v. Charles Baker & Sons*.⁶⁰

⁵⁵ *Turner v. Union Steamship Co. Ltd.* [1964] N.Z.L.R. 468.

⁵⁶ See *Walker v. Turton-Sainsbury* [1952] S.A.S.R. 159 (A without remedy when he accepts a drive in B's racing-car, for the latter was known to be an inexperienced driver of such cars).

⁵⁷ *Thomas v. Quartermaine* (1887) 18 Q.B.D. 685, at 696, per Bowen L.J.

⁵⁸ (1849) 14 Q.B. 185. For another aspect of this decision, see below, § 59.

⁵⁹ The preceding two sentences were cited in *Neilsen v. Redel* [1955] 1 D.L.R. 125, 132.

⁶⁰ [1891] A.C. 325.

The plaintiff was employed in the defendants' stone quarry, and had worked there for months with full knowledge of the fact that he was exposed to danger by reason of the negligent practice of the defendants in swinging stones over the quarrymen's heads by means of a crane. The plaintiff having been injured by the fall of a stone, it was held that he was not, by reason of his knowledge of the danger and his acquiescence in it, *ipso facto* deprived of an action against the defendants, but that such knowledge and acquiescence were merely evidence for a jury on the question whether he had agreed with the defendants to take the risk of such an accident upon himself. In *Bowater v. Rowley Regis Corporation*,⁶¹ the plaintiff, a carter employed by the defendants, had, against his protests, been required by his foreman to take out a horse which both of them knew to be dangerous and which eventually injured him. The defendants' plea of *volenti non fit injuria* failed. Goddard L.J. said ^{61a}: "The maxim *volenti non fit injuria* is one which in the case of master and servant is to be applied with extreme caution. Indeed, I would say that it can hardly ever be applicable where the act to which the servant is said to be *volens* arises out of his ordinary duty, unless the work for which he is engaged is one in which danger is necessarily involved." For there are some trades which cannot be carried on in perfect safety; in such a case the presence of the danger is a mutually recognised element in the bargain for remuneration and the servant may properly be held to have undertaken the risk for the sake of higher pay.⁶² "A good illustration is the task of the housebreaker. We have all of us watched its performance during the war on bomb-shattered buildings in the course of demolition and marvelled at its dangers."⁶³ Another example is a fireman. But even in these cases the risks which the plaintiff undertakes are only those which are usual or contemplated in that trade or profession, not necessarily those which are exceptional and unforeseeable.⁶⁴ The English courts have gone thus far in ensuring that the workman is protected from any misuse

⁶¹ [1944] K.B. 476.

^{61a} [1944] K.B. at 480-481.

⁶² *Hurley v. J. Sanders & Co.* [1955] 1 Lloyd's Rep. 199, 208.

⁶³ *Bowater v. Rowley Regis Corporation* [1944] K.B. 476, at 479, *per* Scott L.J.

⁶⁴ *Merrington v. Ironbridge Metal Works Ltd.* [1952] 2 All E.R. 1101; *Watt v. Hertfordshire C.C.* [1954] 1 W.L.R. 835.

of his employer's superior economic power.⁶⁵ In effect, the workman must not be put into the position of being obliged to make a choice between losing his employment and being deprived of his right of action by continuing his work in the face of known dangers. His choice must be a free one.⁶⁶

Other effects of knowledge

It seems that there are cases where knowledge of the danger, even if it does not prove an agreement to undertake the risk within the rule in *Smith v. Baker*, may nevertheless be relevant to the success of the plaintiff's action for two other reasons:

- (1) It may negative the existence of any negligence on the part of the defendant in causing that danger;
- (2) It may establish the existence of contributory negligence on the part of the plaintiff.

In the first place, there are certain cases in which he who causes a danger fulfils all his legal duty of care by giving notice of that danger to the persons whom it affects.⁶⁷ Thus, he who lends a chattel gratuitously is probably not bound to do anything more than disclose the existence of any dangerous quality of which he actually knows and of which the borrower does not know.⁶⁸ It was once held⁶⁹ that the duty which an occupier of premises owed to an invitee at common law was discharged if it could be shown that the entrant knew of the risk, but this has been reversed by the Occupier's Liability Act, 1957, s. 2 (4), which expressly provides that knowledge of the danger is only one factor to be taken into account in considering whether the occupier has discharged the common duty of care.⁷⁰

In the second place, there are cases in which the act of the plaintiff in knowingly running a risk created by the defendant's wrongful act amounts to contributory negligence on his own

⁶⁵ Dr. Goodhart in 60 L.Q.R. 212, and Lord Wright in 67 L.Q.R. 534. The American courts have not moved so fast.

⁶⁶ But "in these days of trade unions and shop stewards I very much doubt if there are many cases in which a workman would be placed in such a position": *Horton v. London Graving Dock Co.* [1949] 2 All E.R. 169, at 171, per Lynskey J. Cf. *Littlewood v. George Wimpey & Co. Ltd.* [1953] 1 W.L.R. 428, 429.

⁶⁷ This passage was cited by Lord Oaksey in *London Graving Dock Co. v. Horton* [1951] A.C. 737, 758.

⁶⁸ See below, § 118.

⁶⁹ *London Graving Dock Co. v. Horton* [1951] A.C. 737.

⁷⁰ See below, § 107.

part. Since the Law Reform (Contributory Negligence) Act, 1945, this is not a complete bar to recovery but the loss is apportioned between the parties according to their respective degrees of fault. The assessment will depend on whether the conduct of the plaintiff was reasonable, having regard to the magnitude of the risk and the urgency of the occasion. A certain amount of risk I am entitled to face, even with full knowledge, rather than submit to being deprived of my liberty of action by the wrongful act of another. But if the danger is so great that it is a foolhardy and unreasonable act to expose myself to it, I may do so at my own cost. In *Clayards v. Dethick*⁷¹ the plaintiff, a cab-driver, occupied certain stables in Gower Mews, Gower Street, and the defendant wrongfully dug a trench along the passage which afforded the only outlet from the mews to the street. The plaintiff attempted to lead out one of his horses along the passage and over the heaps of soil which the defendant had excavated, and while doing so the horse fell into the trench and was injured. It was held that the defendant was liable; for the plaintiff was not bound to submit to be thus deprived of the use of his stables. He was entitled knowingly to face the danger thus created and to cast all responsibility for the issue upon the wrongdoer. "The whole question was, whether the danger was so obvious that the plaintiff could not with common prudence make the attempt."⁷² This principle was reaffirmed by the House of Lords in *A. C. Billings & Sons Ltd. v. Riden*.⁷³ If the plaintiff acted imprudently, it may be a ground for the reduction of his damages under the Law Reform (Contributory Negligence) Act, 1945.⁷⁴ It is also clear that no risk, however great, can be made the ground of a charge of contributory negligence if the defendant himself requested or ordered or authorised the act of the plaintiff in running the risk. It may have been a foolhardy act of the plaintiff in *Bowater v. Rowley Regis Corporation*⁷⁵ to drive the horse that did the mischief, but this defence was not open to the defendant.

⁷¹ (1848) 12 Q.B. 439.

⁷² (1848) 12 Q.B. 439, at 466, *per* Patteson J. ("who, of course, was a judge of very great experience and learning": *Davies v. Property Corporation Ltd.* [1929] 2 K.B. 222, at 228, *per* Talbot J.).

⁷³ [1958] A.C. 240.

⁷⁴ *Smith v. Austin Lifts Ltd.* [1959] 1 W.L.R. 100.

⁷⁵ [1944] K.B. 476.

Summary

Before the Law Reform (Contributory Negligence) Act, 1945, the courts did not often distinguish very clearly between the defences of *volenti non fit injuria* (or assumption of risk), remoteness of damage, and contributory negligence, for it was seldom necessary for them to do so. But today it is of great importance to keep them distinct, for while *volenti non fit injuria* and remoteness of damage still afford a complete defence there is now power to apportion the loss in cases of contributory negligence. In any event the various concepts are entirely distinct. For a plaintiff may be guilty of contributory negligence if he did not know but ought to have known of the danger which confronted him. But he can never be held to have been *volens* unless it is shown that he had full knowledge of the nature and extent of the risk. Again, a plaintiff may be, and usually is, guilty of contributory negligence when he is careless for his own safety, but he may be truly *volens* even when he is exercising the utmost care for his own safety.⁷⁶

§ 14. Reality of Consent

The consent must be a real consent. It can hardly be doubted that consent obtained by duress (actual violence or threats of violence to the person of the plaintiff) is no real consent. But it is probably not enough for the plaintiff to show that his consent was given reluctantly, or under the mistaken belief that the defendant was legally entitled to act as he did.⁷⁷ If the mistake was induced by the fraud of the defendant, however, it vitiates the consent. It is true that in *Hegarty v. Shine*⁷⁸ the plaintiff was unsuccessful in an action for assault against her paramour, who had infected her with venereal disease, but the decision of the Irish Court of Appeal was based partly on the ground that the defendant's non-disclosure of his disease was not such a fraud as to vitiate consent, and partly on the ground that *ex turpi causa non oritur actio*.⁷⁹ Although there is no liability in criminal law in such a case unless the victim's mistake is as to the real nature of the whole transaction and not merely as to the consequences

⁷⁶ *Heard v. N.Z. Forest Products Ltd.* [1960] N.Z.L.R. 329, 357.

⁷⁷ *Latter v. Braddell* (1881) 50 L.J.Q.B. 448.

⁷⁸ (1878) 4 L.R.Ir. 288.

⁷⁹ On this maxim, see below, § 15.

of the act done,⁸⁰ there is no reason to suppose that this distinction applies in the civil law.⁸¹ Again, a man cannot be said to give a real consent if he acts under the compulsion of a legal duty. Thus it is the duty of a servant to protect his master's premises from fire. If in so doing he runs risks he is not a volunteer, and, if he is injured, he will have a remedy against him whose negligence caused the fire.⁸² A man cannot be said to be "willing" unless he is in a position to choose freely; and freedom of choice predicates the absence from his mind of any feeling of constraint interfering with the freedom of his will.⁸³

RESCUE CASES ⁸⁴

The "rescue cases" hold that the same principle applies if the plaintiff has acted under a moral duty. In *Haynes v. Harwood* ⁸⁵ the Court of Appeal laid it down that "the doctrine of the assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty." ⁸⁶ In that case the defendants' servant had left his van and horses unattended in a crowded street. The horses bolted when a boy threw a stone at them. The plaintiff was a police constable on duty inside a police station; he saw that if nothing was done a woman and children were in grave danger, and at great personal risk managed to stop both horses, but in so doing suffered serious personal injuries. He was entitled to damages. The principle is the same when the plaintiff is under no legal duty to effect the rescue, for example, a passer-by who is injured while rescuing

⁸⁰ *R. v. Clarence* (1888) 22 Q.B.D. 28; *R. v. Williams* [1923] 1 K.B. 340.

⁸¹ Winfield, *Tort*, p. 30.

⁸² *D'Urso v. Sanson* [1939] 4 All E.R. 26; *The Gusty* [1940] P. 159. He may also be entitled to benefit under the National Insurance (Industrial Injuries) Act, 1946.

⁸³ *Bowater v. Rowley Regis Corporation* [1944] K.B. 476, 479; *Merrington v. Ironbridge Metal Works Ltd.* [1952] 2 All E.R. 1101.

⁸⁴ Mannie Brown, "A Study in Negligence" (1932) 10 Can.Bar Rev. 556; Baker, "Rescue Cases Reconsidered" (1949) Univ. of W.A. Ann. L. Rev. 37. [1935] 1 K.B. 146.

⁸⁵ *Per Greer L.J.* at 157, citing the language of Dr. Goodhart in his "Rescue and Voluntary Assumption of Risk" (1935) 5 Camb.L.J. 192, at 196.

a little girl from the danger of being run over by a lorry,⁸⁷ or a doctor who descends a gas-filled well to attempt to rescue two workmen overcome by fumes.⁸⁸ The principle is that if one person by his negligence causes another to be in a position of danger, he should have regard to the probability that a third person, acting bravely and promptly and subjugating any timorous over-concern for his own well-being or comfort, may attempt a rescue.⁸⁹ In some cases it may be argued that a plaintiff who has shown supreme courage has been "unreasonably brave," but the courts do not favour such a plea.⁹⁰

The principle also covers cases where the risk has been incurred to save property belonging either to the rescuer himself or to a third party. "It is no doubt material to consider in every case whether or not it is life or property which is in danger. It is material to consider the relationship of the plaintiff who intervenes in the matter to the property in peril or to the person in peril. It is relevant to consider the degree of danger and risk, and so forth."⁹¹ As has been said in the New York Court of Appeals: "Undoubtedly more risks may be taken to protect life than to protect property without involving the imputation of negligence, but the rule is that a reasonable effort may be made even in the latter case."⁹² So if a fire breaks out it is reasonable to foresee that volunteers may be injured while trying to rescue persons or property.⁹³

The principle also covers cases where the person rescued has been put in peril by his own negligence, and not by that of another.⁹⁴ The principle even extends to cases where the person rescued has himself no cause of action at all, for example, because he is a trespasser or has waived his rights by a contract.⁹⁵ For

⁸⁷ *Gregory v. Miller*, *The Times*, February 9, 1933; *Morgan v. Ayles* [1942] 1 All E.R. 489.

⁸⁸ *Baker v. T. E. Hopkins & Sons Ltd.* [1959] 1 W.L.R. 966.

⁸⁹ *Baker v. T. E. Hopkins & Sons Ltd.* [1959] 1 W.L.R. 966, 976, 977.

⁹⁰ [1959] 1 W.L.R. 966, 979, 984.

⁹¹ *Hyett v. G. W. Ry.* [1948] 1 K.B. 345, at 347-348, *per* Tucker L.J. *Cf. Steel v. Glasgow Iron and Steel Co.*, 1944 S.C. 237, and Dr. Goodhart's comments in 61 L.Q.R. 27; *Malcolm v. Dickson*, 1951 S.C. 542.

⁹² *Wardrop v. Santi Moving and Express Co.* (1922) 233 N.Y. 227; 135 N.E. 272, *per* Andrews J.

⁹³ *Russell v. McCabe* [1962] N.Z.L.R. 392.

⁹⁴ The opinion of Barry J. in *Baker v. T. E. Hopkins & Sons Ltd.* [1958] 1 W.L.R. 993, 1004 (not considered in the C.A.) seems preferable to the decision in *Dupuis v. New Regina Trading Co. Ltd.* [1943] 4 D.L.R. 275.

⁹⁵ *Videan v. British Transport Commission* [1963] 2 Q.B. 650, 669. It is a little difficult to follow the reasoning whereby the Court of Appeal held

the duty of care owed to a rescuer is an original one; it is not derived from or secondary to any duty owed to the rescued person by another,⁹⁶ but is an example of the "neighbour principle" in *Donoghue v. Stevenson*,⁹⁷ In any case it is settled that the act of the rescuer may be reasonable even though it is considered and not instinctive. "The law does not discriminate between the rescuer oblivious of peril and the one who counts the cost. It is enough that the act, whether impulsive or deliberate, is the child of the occasion."⁹⁸

Sometimes the courts have preferred to treat the rescue cases as raising a problem in the law relating to remoteness of damage. Is the intervention of the rescuer an act which breaks the causal sequence of events set in motion by the defendant's initial act of negligence? But as Greer L.J. said in an often-cited passage: "If what is relied upon as *novus actus interveniens* is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence. The whole question is whether . . . the accident can be said to be 'the natural and probable result' of the breach of duty."⁹⁹ As Pollock had said, "The law does not think so meanly of mankind as to hold it otherwise than a natural and probable consequence of a helpless person being put in danger that some able-bodied person should expose himself to the same danger to effect a rescue."¹ It is a question of fact in each case whether the damage suffered by the rescuer is a natural and probable result of the defendant's negligence. Thus a person who rushes out to stop a horse bolting on a desolate country road and is injured is probably without remedy.²

that the defendants ought to have foreseen that a stationmaster would attempt to rescue an infant on the lines (the infant being the stationmaster's son), yet need not have foreseen the presence of that infant himself.

⁹⁶ *Videan v. British Transport Commission* [1963] 2 Q.B. 650.

⁹⁷ For this, see below, § 80.

⁹⁸ *Wagner v. International Railway Co.* (1921) 232 N.Y. 176; 133 N.E. 437, per Cardozo J.; *Haynes v. Harwood* [1935] 1 K.B. 146, 158-159, 164.

⁹⁹ *Haynes v. Harwood* [1935] 1 K.B. 146, at 156.

¹ *Torts*, p. 370. Adopted by Maugham L.J. in [1935] 1 K.B. at 163.

² [1935] 1 K.B. at 163. See also *Cutler v. United Dairies (London) Ltd.* [1933] 2 K.B. 297; *Sylvester v. Chapman Ltd.* (1935) 79 S.J. 777 (plaintiff mauled by leopard whilst inside barrier endeavouring to extinguish cigarette end lying on straw at circus: action failed).

Volunteers

It was once held that the doctrine of common employment applied to any person who, on his own initiative, or at the request of a servant or his master, gratuitously and temporarily assisted the servant in his work. By such assistance he put himself *quoad hoc* in the position of a fellow-servant of the servant assisted by him, and therefore precluded himself from suing the employer for any harm resulting. Today it seems best to free these cases as far as possible from the entanglement of the obsolete doctrine of common employment. It is suggested that the true principle should be that one who interferes wilfully and officiously in another's affairs takes the risk of all injuries which are not inflicted in deliberate disregard of his presence. Such a person is a mere volunteer with no claim to better treatment than a trespasser.³ This principle, however, has no application where (1) the relationship of master and servant is in fact established between the parties, or (2) the plaintiff had volunteered to save the property of another in an emergency,⁴ or (3) the plaintiff had a common interest in the matter with the defendant,⁵ or (4) where the defendant was in all the circumstances of the case under a duty to take reasonable care for the plaintiff's safety. Such a duty may be established when the defendant invites the plaintiff to assist him in some job of work, even though the plaintiff stands to gain nothing from it.⁶

§ 15. Plaintiff a Wrongdoer⁷

This is a rather obscure corner of the law. Confusion has been increased by the use of the maxim *ex turpi causa non oritur actio*, which has its proper field of application in the law of contract. It is settled that if an act is in itself a criminal act it does

³ This would be in accord with the refusal of the law of contracts to recognise the *negotiorum gestor* of Roman law. In our law liabilities are not to be forced on people behind their backs.

⁴ *Cutler v. United Dairies Ltd.* [1938] 2 K.B. 297, 305, 306-307. For the "rescue cases," see above, § 14.

⁵ *Hayward v. Drury Lane Theatre* [1917] 2 K.B. 899; *Lomas v. Jones* [1944] K.B. 4.

⁶ *Fitzgerald v. G.N.R. (I.) Ltd.* [1947] N.I. 1—a full review of the cases by MacDermott J. *Hester v. Liptrap (James) Ltd.* (unreported) 1954 C.A. 26 is a good example of the present-day approach.

⁷ See Winfield, *Province*, pp. 86-91; Williams, "Vicarious Liability" (1956) 72 L.Q.R. 522, 537-539; Crago, "The Defence of Illegality in Negligence Actions" (1964) 4 M.U.L.R. 534.

not cease to be criminal because the person to whose detriment it is done consents to it. "No person can license another to commit a crime."⁸ Thus no person can lawfully consent to his own death, so that killing a man in a duel is murder. Nor can anyone lawfully consent to bodily harm, save for some reasonable purpose: for example, a proper surgical operation or manly sports.⁹ It is not so clear whether consent in such cases is a good defence to a civil action, although it is submitted that on principle it ought to be, at any rate if the wrongful act is a step in the execution of the common illegal purpose. Thus, if two men injure each other in a prize fight, they may be prosecuted criminally; but it is difficult to suppose that either of them has a good cause of action against the other.¹⁰ On the other hand, "if A and B are proceeding to the premises which they intend burglariously to enter, and before they enter them, B picks A's pocket and steals his watch, I cannot prevail on myself to believe that A could not sue in tort (provided he had first prosecuted B for larceny). The theft is totally unconnected with the burglary."¹¹ In such a case the appropriate principle is that the mere fact that the plaintiff is a wrongdoer is no defence.¹² Other examples of this principle may be offered. One who is a trespasser on land cannot be maltreated with impunity by the occupier,¹³ and one who is in breach of the obligations for ensuring safety imposed by the Road Traffic Acts, or the Factories Acts, or the Mines and Quarries Act, is not debarred from suing by reason of the maxim *ex turpi causa non oritur actio*, although his damages may be reduced on the ground of contributory negligence.¹⁴

⁸ *R. v. Donovan* [1934] 2 K.B. 498, at 507. There are of course acts which are only criminal if done without the consent of the person affected.

⁹ *R. v. Donovan* [1934] 2 K.B. 498, 509; *Bravery v. Bravery* [1954] 1 W.L.R. 1169.

¹⁰ *Green v. Carroll* [1961] N.Z.L.R. 1010.

¹¹ *National Coal Board v. England* [1954] A.C. 403, at 428, *per* Lord Asquith of Bishopstone. See *Danluk v. Birkner* [1946] 3 D.L.R. 172; [1947] 3 D.L.R. 337 (patron of illegal betting establishment injured when leaving by unusual exit in fear of police raid); *Williams v. Port of Liverpool Stevedoring Co.* [1956] 1 W.L.R. 551. If the plaintiff in *Donoghue v. Stevenson* (below, § 80) had stolen the bottle of ginger-beer, would she have been successful?

¹² See *Green v. Carroll* [1961] N.Z.L.R. 1010.

¹³ Below, § 112.

¹⁴ *National Coal Board v. England* [1953] 1 Q.B. 724; [1954] A.C. 403.

§ 16. Statutory Authority

When a statute specially authorises a certain act to be done by a certain person, which would otherwise be unlawful and actionable, no action will lie at the suit of any person for the doing of that act. For such a statutory authority is also a statutory indemnity, taking away all legal remedies provided by the law of torts for persons injuriously affected. No compensation is obtainable save that, if any, which is expressly provided by the statute itself. This defence of statutory authority has its most important application in actions of nuisance, but it is one of general application throughout the whole sphere of civil liability. This statutory authority and indemnity extends not merely to the act itself but also to all its necessary consequences. When the legislature has authorised an act, it must be deemed also to have authorised by implication all inevitable results of that act; for otherwise the authority to do the act would be nugatory.¹⁵ The test of the necessity of a consequence is the impossibility of avoiding it by the exercise of due care and skill. "The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common-sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense."¹⁶ "For I take it, without citing cases, that it is now thoroughly well established, that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule, negligence not to make such reasonable exercise of their powers."¹⁷

¹⁵ *Quebec Ry. v. Vandry* [1920] A.C. 662, 680.

¹⁶ *Manchester Corporation v. Farnworth* [1930] A.C. 171, at 183, *per* Lord Dunedin. See *Provender Millers v. Southampton C.C.* [1940] Ch. 131, 136-140, 150.

¹⁷ *Geddis v. Proprietors of Bann Reservoir* (1878) 3 App.Cas. 430, at 455, *per* Lord Blackburn. *Dunne v. North-Western Gas Board* [1964] 2

The distinction drawn may be seen from a comparison of two cases. In *Pride of Derby and Derbyshire Angling Association Ltd. v. British Celanese Ltd.*¹⁸ the second defendant, the Derby Corporation, admitted that it had polluted the plaintiff's fishery in the River Derwent by discharging into it insufficiently treated sewage, but claimed that by the Derby Corporation Act, 1901, it was under a duty to provide a sewerage system, and that the system which had accordingly been provided had become inadequate solely from the increase in the population of Derby. The Court of Appeal held that it was not inevitable that the work constructed under the Act of 1901 should cause a nuisance, and that in any case the Act on its true construction did not authorise the commission of a nuisance. But in *Vaughan v. Taff Vale Ry.*¹⁹ the defendant company, having statutory authority to use locomotive steam-engines, was held not liable for a fire caused by an escape of sparks, it being proved that the engines were constructed with all due care and skill, and that it was impossible wholly to prevent the escape of sparks. At common law it would have been an actionable nuisance to use engines which were a source of danger; and it would have been no defence that they had been made as safe as they could be.²⁰

DIFFERENT CLASSES OF STATUTES

It is very necessary, however, in the application of the foregoing rule to distinguish between absolute and conditional statutory authority. Absolute authority is authority to do the act notwithstanding the fact that it necessarily causes a nuisance or other injurious consequence. Conditional authority is authority to do the act provided it can be done without causing a nuisance or other injurious consequence. This condition is sometimes expressed, but is more often left to be implied from

Q.B. 806 is the latest of the many cases in which this dictum has been approved.

¹⁸ [1953] Ch. 149.

¹⁹ (1860) 5 H. & N. 679. (The defendants later settled the plaintiff's claim in consideration of his abandonment of his right of appeal to the H.L.) The effect of this decision has been partly excluded by the Railway Fires Acts, 1905 and 1923, which provide that railway companies shall be liable, notwithstanding their statutory authority, to the extent of two hundred pounds at the most, for damage done to agricultural land or crops by the escape of sparks or cinders from locomotive engines.

²⁰ *Jones v. Festiniog Ry.* (1868) L.R. 3 Q.B. 733.

the general provisions of the statute. In *Metropolitan Asylum District v. Hill* ²¹ a local authority, having statutory authority to erect a smallpox hospital, was restrained from erecting one in a place in which it would have been a source of danger to the residents of the neighbourhood. This statutory authority was construed, not as an absolute authority to erect a hospital where the defendants pleased, and whether a nuisance was thereby created or not, but as a conditional authority to erect one if they could obtain a suitable site where no nuisance would result. Whether authority is absolute or conditional is a question of construction depending on all the circumstances of the case. Where the authority is imperative, and not merely permissive, it is necessarily absolute—that is to say, when the statute not merely authorises but also directs a thing to be done, then it may be done regardless of any nuisance that necessarily flows from it.²² An authority which is merely permissive, on the other hand, is *prima facie* conditional only; for the legislature will not be deemed, even at the present day, in the absence of special reasons for so holding, to have intended to take away the rights of private persons without compensation.²³ The burden of proof lies upon those who seek to show that a statute is intended to have such an intention to take away the private rights of individuals without compensation.²⁴ In considering this question, a distinction may be drawn between statutory powers to execute some particular work or carry on some particular undertaking (*e.g.*, the erection of the smallpox hospital in *Metropolitan Asylum District v. Hill* ²¹), when the power will be held to be limited to the particular act authorised, and statutory powers to execute a variety of works of specified descriptions in a given area which will necessarily involve some interference with the rights of others whenever the body invested with the power deems it expedient to do so in furtherance of a general duty imposed on it by the statute (*e.g.*, the powers conferred on a catchment board by the Land Drainage Act, 1930).

²¹ (1881) 6 App.Cas. 193.

²² *Metropolitan Asylum District v. Hill* (1881) 6 App.Cas. 193, 213.

²³ (1881) 6 App.Cas. 208, 213.

²⁴ But the fact that no compensation has been provided for does not mean that no interference with private rights was intended: *Edgington v. Swindon Corporation* [1889] 1 K.B. 86.

The court will be readier to conclude that the case falls within the latter class and the common law right of action taken away if the statute expressly provides a remedy by way of compensation for persons injured by the exercise of the powers conferred. But the authority upon whom such statutory powers are conferred must in any case be acting in good faith and within the scope of the powers conferred.²⁵ But cases such as *Metropolitan Asylum District v. Hill* are rare, for unless the statute gives the right to interfere with private rights it is seldom of much value.

Powers and duties

A statute conferring a power must not be construed as imposing a duty.²⁶ A person entrusted with a mere power cannot be made liable for any damage sustained by reason of the fact that he has not exercised that power at all or has discontinued the exercise of it or has exercised it inadequately.²⁷ If there is no duty to do a thing there is no negligence in abstaining from doing it.²⁸ The only duty owed in such a case is not to add to the damage that would have been suffered if nothing had been done.²⁹

Duty to light highways

The application of the principles above set out to the liability of public authorities for accidents due to the absence or insufficiency of the lighting of obstructions in the highway has been considered by the courts in many cases, not all of which are easy to reconcile. The lighting restrictions imposed during war time added to the importance of the subject. Sometimes a public body is given authority to provide street lighting, as under section 161 of the Public Health Act, 1875; sometimes a duty is imposed upon it to do so, as under section 180 of the Metropolis Management Act, 1855. Where a mere power or authority is conferred the public body will not be liable if, in the exercise of its discretion, it provides no lighting or insufficient lighting or discontinues lighting which it has previously provided, so long as the obstruction has not been created or maintained by the

²⁵ *Marriage v. East Norfolk Catchment Board* [1950] 1 K.B. 284, 305-306.

²⁶ *Bank View Mill Ltd. v. Nelson Corporation* [1948] K.B. 337, 341.

²⁷ *East Suffolk Catchment Board v. Kent* [1941] A.C. 74.

²⁸ *Sheppard v. Glossop Corporation* [1921] 3 K.B. 132, 145.

²⁹ *East Suffolk Catchment Board v. Kent* [1941] A.C. 74, 102.

public body itself.³⁰ Where a duty is imposed the public body will be involved in liability if it fails to carry out its duty.³¹ A public body may, however, be under a duty to light independently of these statutory powers and duties. At common law an obstruction to a highway is indictable, and if it causes special damage to an individual is actionable at his suit.³² An unlighted obstruction is actionable, sometimes without proof of negligence.³³ But public bodies are often given statutory authority to create obstructions in highways, for example, lamp standards, street refuges, sand-bins and so forth. Primarily it is a question of the proper construction of the relevant statute.³⁴ The duty is one to take reasonable steps to prevent the obstruction becoming a danger to the public. At night-time this duty will normally be discharged if the obstruction is properly lit; in the daytime (or at night when the lighting system is for some reason suspended—*e.g.*, by “blackout” restrictions) it will be fulfilled by taking such steps as are reasonable in the circumstances.

³⁰ *Sheppard v. Glossop Corporation* [1921] 3 K.B. 132.

³¹ *Carpenter v. Finsbury B. C.* [1920] 2 K.B. 195.

³² Below, § 81.

³³ Below, § 81.

³⁴ *Fisher v. Ruislip-Northwood U. D. C.* [1945] K.B. 584; *Darling v. Att.-Gen.* [1950] 2 All E.R. 793. See Dr. Goodhart, “Precedents in the Court of Appeal” (1947) 9 Camb.L.J. 349.

TRESPASS TO LAND

§ 17. The Nature of Trespass to Land

THE wrong of trespass to land (*trespass quare clausum fregit*) consists in the act of (1) entering upon land in the possession of the plaintiff, or (2) remaining upon such land, or (3) placing or projecting any material object upon it—in each case without lawful justification.

(1) Trespass by wrongful entry

The commonest form of trespass consists in a personal entry by the defendant, or by some other person through his procurement, into land or buildings occupied by the plaintiff. The slightest crossing of the boundary is sufficient—*e.g.*, to put one's hand through a window, or to sit upon a fence. Nor, indeed, does it seem essential that there should be any crossing of the boundary at all, provided that there is some physical contact with the plaintiff's property.¹ There may be sufficient physical interference if matter is deliberately placed where natural forces will carry it to the land of the plaintiff—*e.g.*, if oil is jettisoned in such circumstances that wind and wave must carry it to the foreshore of the plaintiff.² The courts have taken account of scientific developments, and the matter constituting a trespass need no longer be tangible—it may be a gas,³ or invisible fumes or particulates.⁴ But depriving an occupier of facilities—*e.g.*, gas and electricity—without interfering with his possession is not a trespass.⁵ This like all other forms of trespass is actionable *per se* without any proof of damage.⁶ “Every invasion of property, be

¹ *Gregory v. Piper* (1829) 9 B. & C. 591. (“If a single stone had been put against the wall it would have been sufficient.”)

² *Southport Corporation v. Esso Petroleum Ltd.* [1953] 3 W.L.R. 773, 776–777 (Devlin J.); [1954] 2 Q.B. 182, 204 (Morris L.J.); *contra*, [1954] 2 Q.B. 182, 195 (Denning L.J.); [1956] A.C. 242, 244 (Lords Radcliffe and Tucker). See Newark, Note, 17 M.L.R. 580.

³ *McDonald v. Associated Fuels* [1954] 3 D.L.R. 775.

⁴ *Martin v. Reynolds Metal Co.* (1959) 221 Ore. 86, 342 P. (2d) 790.

⁵ *Perera v. Vandiyar* [1953] 1 W.L.R. 672.

⁶ *Ashby v. White* (1703) 2 Ld.Raym. 938. But in criminal law actual damage must be shown for a prosecution to succeed under the Malicious Damage

it ever so minute, is a trespass.”⁷ If the entry is intentional, it is actionable even though made under an inevitable mistake of law or fact and even though the defendant honestly believed that the land was his own or that he had a right of entry on it.⁸ There is no foundation for the assumption that a man cannot be a trespasser unless he knows he is one.⁹ Therefore an action of trespass may be used to determine a disputed title to land, though today a declaratory judgment may be preferred.

Accidental trespasses

Whether an accidental as opposed to a mistaken entry is actionable is open to doubt: there is little or no authority upon the point and the matter is of small importance, though there has been a good deal of discussion upon it. The Statute of Limitations, 1628, enacts that in all actions of trespass *quare clausum fregit* the defendant may plead a disclaimer of any title or claim to the land, that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends before action brought, in which case the plaintiff is barred of his action. This seems to imply that an involuntary trespass is actionable if no amends are tendered. The statute has been very strictly construed¹⁰ and in effect only gives protection in cases of cattle trespass. The ordinary rambler in the country trespasses by mistake, not involuntarily. But in *Beckwith v. Shordike*¹¹ it seems to have been the opinion of the court that it might be a good defence to prove that the trespass was accidental and involuntary, for example, trespass by one's dog. But as it now seems settled that inevitable accident is a defence in actions of trespass to the person and to chattels¹² it would be strange if a different rule governed trespass to land.¹³

Act, 1861. Hence the notice “Trespassers will be Prosecuted” is misleading.

⁷ *Entick v. Carrington* (1765) 19 St.Tr. 1030, 1066.

⁸ *Basely v. Clarkson* (1682) 3 Lev. 37 (in mowing his own land the defendant by mistake mowed grass on the plaintiff's adjoining land); *Hewlitt v. Bickerton* (1947) C.L.C. 10504 (no right to trespass on another's land to repair one's own buildings).

⁹ *Conway v. Wimpey & Co. (No. 2)* [1951] 2 K.B. 266, 273.

¹⁰ *Basely v. Clarkson* (1682) 3 Lev. 37; Williams, *Animals*, p. 196.

¹¹ (1767) 4 Burr. 2092.

¹² *National Coal Board v. Evans (J. E.) & Co. Ltd.* [1951] 2 K.B. 861, discussed below, § 52. (Yet there is reason to believe that in cattle trespass inevitable accident is no defence: below, § 139.)

¹³ This sentence was cited with approval in *Mann v. Saulnier* (1959) 19 D.L.R. (2d) 180, 182.

Statutory rights of entry

It must not be forgotten that many modern statutes confer a right of entry upon private property,¹⁴ in addition to the older common law powers of entry.¹⁵ Thus the National Parks and Access to the Countryside Act, 1949, s. 60, provides that "where an access agreement or order is in force as respects any land a person who enters upon land comprised in the agreement or order for the purpose of open-air recreation without breaking or damaging any wall, fence, hedge or gate, or who is on such land for that purpose after having so entered thereon, shall not be treated as a trespasser on that land or incur any other liability by reason only of so entering or being on the land."¹⁶

Trespass by abuse of right of entry: highways

Even he who has a right of entry on the land of another for a specific purpose commits a trespass if he enters for any other purpose or under any other claim or title apart from that under which he might lawfully enter.¹⁷ The chief application of this rule is the abuse of a right of way, public or private; but presumably the same principle applies to all rights of entry—for example, to one given by contract.¹⁸ A public highway is a piece of land vested either in some local authority or in the adjoining landowners and subject to a public right of way. The law vests in the highway authority the top spit, "or perhaps, I should say, the top two spits,"¹⁹ of the road for a legal estate in fee simple determinable on its ceasing to be a highway. Any person who uses a highway for any purpose other than that of passage (including the subordinate purposes reasonably and ordinarily

¹⁴ Below, § 111.

¹⁵ For examples of these, see below, § 111. It is doubtful whether such a right can be exercised forcibly: Allen, *The Queen's Peace*, p. 48.

¹⁶ Such a person may, however, incur liability if he fails to observe any of the 15 restrictions on user set out in the Second Schedule to the Act, or any restriction contained in the access agreement or order itself.

¹⁷ *Strong v. Russell* (1904) 24 N.Z.L.R. 916 (defendant held a trespasser as he had entered in order to contest plaintiff's title, and not under the licence previously given him).

¹⁸ *Gross v. Wright* [1923] 2 D.L.R. 171, and the cases on trespass *ab initio*, below, § 21.

¹⁹ *Tithe Redemption Commission v. Runcorn U.D.C.* [1954] Ch. 383, at 407, *per* Denning L.J.

incident to passage, such as sitting down to rest²⁰ or perhaps even to sketch²¹) becomes a trespasser against the owner²² of the sub-soil.²³ Thus it is a trespass to depasture one's cattle on the highway,²⁴ or to go there for the purpose of interfering with the adjoining occupier's right of shooting,²⁵ or of persistently watching what is being done on the adjoining land,²⁶ or of picketing premises,²⁷ unless protected by the Trade Disputes Act, 1906, s. 2.²⁸

So it is a trespass against the Crown to use the foreshore for the purpose of bathing in the sea, for the only right to enter upon the shore when dry is for the purposes of navigation or shipping. The public have certain rights of fishing and of necessity over the foreshore, but no general right of way along it.²⁹ It is not necessary that the thing so done in abuse of the right of entry should be the cause of any harm to the occupier of the land or to anyone else. It is enough that it falls outside the purpose for which the right is conferred. But if the act done on the land is within that purpose, it does not matter what ulterior object the defendant may have in exercising his right of entry. Thus it is not a trespass to walk along a highway with the object of

²⁰ Or parking a car for some temporary and limited purpose: *Rodgers v. Ministry of Transport* [1952] 1 T.L.R. 625; *Randall v. Tarrant* [1955] 1 W.L.R. 255.

²¹ See *Liddle v. Yorkshire (North Riding) C.C.* [1934] 2 K.B. 101, 127.

²² But it does not follow that other persons using the highway are thereby relieved of any duty to take reasonable care for the trespasser's safety: *Farrugia v. G.W. Ry.* [1947] 2 All E.R. 565. Yet see *Young v. Edward Box Ltd.* [1951] 1 T.L.R. 789, 798.

²³ *Hickman v. Maisey* [1900] 1 Q.B. 752. It is not clear how far this principle has survived *Tithe Redemption Commission v. Runcorn U.D.C.* [1954] Ch. 383.

²⁴ *Dovaston v. Payne* (1795) 2 H.Bl. 527.

²⁵ *Harrison v. Rutland (Duke of)* [1893] 1 Q.B. 142.

²⁶ *Hickman v. Maisey* [1900] 1 Q.B. 752. It does not seem that the defendant in this case (unlike *Harrison v. Rutland*) owned the subsoil of the highway. Cf. *The Carlgarth* [1927] P. 93, 107-108, where Scrutton L.J. said: "There is no right to sit in the middle of a road and say one is exercising a right to use a public roadway."

²⁷ *Ferguson v. O'Gorman* [1937] I.R. 620.

²⁸ For this, see below, § 149.

²⁹ *Blundell v. Catterall* (1821) 5 B. & Ald. 268; *Llandudno U.D.C. v. Woods* [1899] 2 Ch. 705; *Brinckman v. Matley* [1904] 2 Ch. 313 (in which Vaughan Williams L.J. observed, at 323, that the judgment of Holroyd J. in *Blundell v. Catterall* "has come to be regarded as one of the finest examples we have of the way in which the judgment of an English judge ought to be expressed, and the reasons for it given"); *Williams-Ellis v. Cobb* [1935] 1 K.B. 310. See Lemmon, *Public Rights in the Seashore* (1934), pp. 191-199.

committing a crime elsewhere.³⁰ Moreover, even a wrongful act done upon the land itself does not make the defendant a trespasser within the present rule, unless it can be shown that he entered for that purpose. If he entered for a lawful purpose, he is no trespasser unless the case is one to which the doctrine of trespass *ab initio* applies.³¹

Ejectment

Any person wrongfully dispossessed of land may sue for the specific restitution of it in an action of ejectment. Originally this action was a special variety of trespass and available only to leaseholders. But in time and by the aid of the most elaborate fictions it came to be used by freeholders also.³² All these fictions have now been swept away; in theory even the term ejectment has been replaced by the term action for the recovery of land. The older term is, however, retained in practice.

(2) Trespass by remaining on land

Even a person who has lawfully entered on land in the possession of another commits a trespass if he remains there after his right of entry has ceased. To refuse or omit to leave the plaintiff's land or vehicle³³ is as much a trespass as to enter originally without right. Thus any person who is present by the leave and licence of the occupier may, as a general rule, when the licence has been properly terminated, be sued or ejected as a trespasser, if after request and after the lapse of a reasonable time he fails to leave the premises.³⁴ We shall consider later the degree of force which may be used to eject a trespasser.³⁵ This must be distinguished from the case of a person lawfully in possession of land who refuses or omits to give it up on the termination of his lease or other interest. A lessee holding over is no trespasser until demand made; for a trespass can be committed, as we shall see, only against the person in the present possession of the property.³⁶

³⁰ *Harrison v. Rutland (Duke of)* [1893] 1 Q.B. 142, 158.

³¹ *Hickman v. Maisey* [1900] 1 Q.B. 752, 757. See § 21.

³² For details, see Holdsworth, H.E.L., iii, pp. 213-217; vii, pp. 4-23.

³³ *C.P.R. v. Gaud* [1949] 2 K.B. 239 (ship).

³⁴ See authorities cited in § 29.

³⁵ See below, § 52.

³⁶ *Hey v. Moorhouse* (1839) 6 Bing.N.C. 52.

(3) Trespass by placing things on land

It is a trespass to place any chattel upon the plaintiff's land,³⁷ or to cause any physical object or noxious substance³⁸ to cross the boundary of the plaintiff's land, or even simply to come into physical contact with the land, though there may be no crossing of the boundary: for example, to turn cattle upon the land, or to throw stones upon it, or to drive nails into a wall, to cause a Virginia creeper to grow upon it,³⁹ or to lean a ladder, planks or a shed, or to pile rubbish, against it.⁴⁰

Trespass and nuisance

In all such cases, in order to be actionable as a trespass, the injury must be direct, within the meaning of the distinction between direct and consequential injuries which has been already explained as determining the line between trespass and case.⁴¹ It is a trespass, and therefore actionable *per se*, directly to place material objects upon another's land; it is not a trespass, but at the most a nuisance or other wrong actionable only on proof of damage, to do an act which consequentially results in the entry of such objects. To throw stones upon one's neighbour's premises is the wrong of trespass; to allow stones from a ruinous chimney to fall upon those premises is the wrong of nuisance.⁴²

§ 18. Continuing Trespasses

That trespass by way of personal entry is a continuing injury, lasting as long as the personal presence of the wrongdoer, and giving rise to actions *de die in diem* so long as it lasts, is

³⁷ *Turner v. Thorne* (1960) 21 D.L.R. (2d) 29 (parcels delivered in error).

³⁸ *McDonald v. Associated Fuels* [1954] 3 D.L.R. 775 (blowing carbon monoxide into a house a trespass).

³⁹ *Simpson v. Weber* (1925) 41 T.L.R. 302.

⁴⁰ *Westripp v. Baldock* [1939] 1 All E.R. 279.

⁴¹ See above, § 2.

⁴² This paragraph was approved in *Mann v. Saulnier* (1959) 19 D.L.R. (2d) 130, 132, in which it was held to be nuisance and not trespass when the top of a fence encroached on adjoining land due to the effects of frost. It is true that under the old practice the wrong of allowing cattle to stray into another's land was dealt with by writ of trespass, but this must be regarded as an anomaly. To drive cattle upon another's land is a true trespass; to allow them by default of fencing or watching to escape into another's land is not in truth a trespass, but a nuisance, and in strictness the remedy ought to have been in case. It is impossible logically to class the escape of cattle as a trespass and the escape of water as a nuisance. See below, § 188.

sufficiently obvious.⁴³ It is well settled, however, that the same characteristic belongs in law even to those trespasses which consist in placing things upon the plaintiff's land. Such a trespass continues until it has been abated by the removal of the thing which is thus trespassing; successive actions will lie from day to day until it is so removed; and in each action damages (unless awarded in lieu of an injunction) are assessed only up to the date of the action.⁴⁴ Whether this doctrine is either logical or convenient may be a question, but it has been repeatedly decided to be the law.⁴⁵ It seems that, if things are placed on land under leave and licence and are not removed within a reasonable time after the licence is withdrawn, a continuing trespass is committed.⁴⁶ These cases of continuing trespass must be distinguished from cases of the continuing consequences of trespass which is over and done with. If I trespass on another's land, and make an excavation there without leaving any rubbish on the land, the trespass ceases so soon as I leave the land, and does not continue until I have filled the excavation up again. Consequently only one action will lie, and in it full damages are recoverable for both the past and the future.⁴⁷ *Aliter* if I have brought a heap of soil and left it on the plaintiff's land.

§ 19. Trespass beneath and above the Surface

In general he who owns or possesses the surface of land owns or possesses all the underlying *strata* also.⁴⁸ Any entry beneath the surface, therefore, at whatever depth, is an actionable trespass; as when the owner of an adjoining coal mine takes coal from under the plaintiff's land. Where the possession of the surface has become separated from that of the subsoil (as by a conveyance of the subsoil for mining purposes, reserving the surface) any infringement of the horizontal boundary thus created is a trespass. It is also commonly said that the ownership and possession of land bring with them the ownership and possession

⁴³ *Winterbourne v. Morgan* (1809) 11 East 395, 405.

⁴⁴ Below, § 222.

⁴⁵ *Bowyer v. Cooke* (1847) 4 C.B. 236.

⁴⁶ *Konskier v. B. Goodman & Co. Ltd.* [1928] 1 K.B. 421 (débris left on premises of predecessor of plaintiff). Compare, however, the case of persons entering under leave and licence: below, § 29.

⁴⁷ *Clegg v. Dearden* (1848) 12 Q.B. 576.

⁴⁸ *Corbett v. Hill* (1870) L.R. 9 Eq. 671, 673.

of the column of space above the surface *ad infinitum*. *Cujus est solum, ejus est usque ad coelum et usque ad inferos*.⁴⁹ This is true to this extent, that the owner of the land has in private law the right to use for his own purposes, to the exclusion of all other persons, the airspace above it. He may build the Tower of Babel if he pleases, and may remove all things situated above the surface, even though they are the property of others, and though their presence there does him no harm and is no wrong for which he has any right of action against the owners. Thus he may cut the overhanging branches of a tree growing in his neighbour's land, whether they do him harm or not⁵⁰; yet he has no right of action against the owner of the tree unless he can show actual damage.⁵¹ So he may cut and remove an unauthorised telegraph or other electric wire stretched through the air above his land, at whatever height it may be, and whether he can show that he suffers any harm or inconvenience from it or not.⁵²

All entries actionable

It ought not to follow from this that any entry above the surface is in itself an actionable trespass. Salmond thought⁵³ that such an extension of the rights of a landowner would be an unreasonable restriction of the right of the public to the use of the atmospheric space above the earth's surface. It would make it an actionable wrong to fly a kite, or send a message by a carrier pigeon, or ascend in an aeroplane, or fire a bullet across it,⁵⁴ even in cases where no actual or probable damage, danger, or inconvenience could be proved by the subjacent landowners.

⁴⁹ Co.Litt. 4a; *Corbett v. Hill* (1870) L.R. 9 Eq. 671. "Law makes long spokes of the short stakes of men," was the comment of the poet William Empson: *Cambridge Poetry* (1929). In international law recent State practice supports the view that the limit of sovereignty is the height above which it is possible to place a satellite in orbit—i.e., somewhere between 20 and 100 miles: McMahon, "Legal Aspects of Outer Space" (1962) 38 B.Y.I.L. 339.

⁵⁰ *Lemmon v. Webb* [1895] A.C. 1.

⁵¹ *Smith v. Giddy* [1904] 2 K.B. 448. Below, § 232.

⁵² *Wandsworth Board of Works v. United Telephone Co.* (1884) 13 Q.B.D. 904, 927.

⁵³ 6th ed., p. 226.

⁵⁴ As in the Tasmanian cat case (*Davies v. Bennison* (1927) 22 Tas.L.R. 52) in which the defendant shot a cat on the plaintiff's roof. The plaintiff was held entitled to damages for trespass to land as well as for the value of the cat.

In his submission there could be no trespass without some physical contact with the land (including, of course, buildings, trees, and other things attached to the soil), and a mere entry into the air-space above the land was not an actionable wrong unless it caused some harm, danger, or inconvenience to the occupier of the surface, when there was a cause of action in the nature of nuisance.⁵⁵ The state of the authorities is such that it is still impossible to say with confidence what the law on this point really is.⁵⁶ It has been held that a direct infringement of the air-space over another man's land is a trespass,⁵⁷ so that the owner of a one-storey shop was entitled to a mandatory injunction requiring the removal of an advertising sign protruding by no more than eight inches into the super-incumbent column of air-space. But an appellate court could still adopt Salmond's view.⁵⁸

Aircraft

In respect of aeroplanes and other aircraft this matter is now dealt with by statute. By section 40 of the Civil Aviation Act, 1949,⁵⁹ it is provided that "no action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground, which, having regard to wind, weather and all the circumstances of the case, is reasonable, or the ordinary incidents of such flight, so long as" certain provisions of the Act or any orders made thereunder are observed. The same section of the same Act,

⁵⁵ See *Lacroix v. The Queen* [1954] Ex.C.R. 69. In 1948 it was reported that aircraft from Nevada had dropped ice into clouds above Utah to stimulate snowfalls for skiing competitions in the former state. The inhabitants of Utah complained that this "cloud snatching" deprived them of their expected rainfall.

⁵⁶ In *Penruddock's Case* (1597) 5 Rep. 100; *Baten's Case* (1610) 9 Rep. 53; *Pickering v. Rudd* (1815) 4 Camp. 219; 1 Starkie 56 (better report); *Clifton v. Bury (Viscount)* (1887) 4 T.L.R. 8, projections over the plaintiff's land were dealt with as nuisances and not as trespasses. But in the following cases it seems to have been assumed that any entry into the space above the plaintiff's land is a trespass: *Fay v. Prentice* (1845) 1 C.B. 828, 835; *Kenyon v. Hart* (1865) 6 B. & S. 249, 252; *Ellis v. Loftus Iron Co.* (1874) L.R. 10 C.P. 10; *Wandsworth Board of Works v. United Telephone Co.* (1884) 13 Q.B.D. 904, 915, 919, 927; *Gifford v. Dent* [1926] W.N. 336. See also *Andrews v. Abertillery Urban District Council* [1911] 2 Ch. 398, 406, 408, 413, 415.

⁵⁷ *Kelsen v. Imperial Tobacco Co. Ltd.* [1957] 2 Q.B. 334.

⁵⁸ Which seems to have been preferred by the C.A. in *Lemmon v. Webb* [1894] 3 Ch. 1 and *Davey v. Harrow Corporation* [1958] 1 Q.B. 60, 70.

⁵⁹ See McNair, *The Law of the Air*, Chap. 4.

however, makes the owner of aircraft liable for all material loss or damage caused by it, or by a person in, or by an article or person falling from it, while in flight, taking off,⁶⁰ or landing, whether to person or property, "without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect, or default of the owner of the aircraft," except where there is contributory negligence, and gives the owner a right of action over against the person whose negligence actually caused the damage. The Act does not apply to aircraft in the service of Her Majesty. Liability for damage done by spacecraft is obscure, but probably international law recognises strict liability.⁶¹

§ 20. The Title of the Plaintiff

A trespass is actionable only at the suit of him who is in possession of the land, using the word possession in its strict sense as including a person entitled to immediate and exclusive possession.⁶² Where it is uncertain which of several claimants has possession, it will be adjudged to be in him who can prove title, *i.e.*, the right to possess.⁶³ This form of injury is essentially a violation of the right of possession, not of the right of property. It is a disturbance of the right of exclusive use vested in the occupier of land. Ownership unaccompanied by possession is protected by other remedies.⁶⁴ Thus a landlord cannot sue for a mere trespass to land in the occupation of his tenant; such an action can be brought only by the tenant.⁶⁵ The landlord has no right of action unless he can prove more than a mere trespass—*viz.*, actual harm done to the property, of such sort as to affect the value of his reversionary interest in it.⁶⁶ For the same reason the mere use of land, without the exclusive possession of it, is

⁶⁰ See *Blankley v. Godley* [1952] 1 All E.R. 436n.

⁶¹ McMahon, "Legal Aspects of Outer Space" (1962) 38 B.Y.I.L. 339, 384.

⁶² *Thompson v. Ward* [1953] 2 Q.B. 153, 158-159.

⁶³ *Hegan v. Carolan* [1916] 2 I.R. 27.

⁶⁴ *Wallis v. Hands* [1893] 2 Ch. 75.

⁶⁵ In *Attersoll v. Stevens* (1808) 1 Taunt. 183, 190, Mansfield C.J. thought that where a trespass had been committed to land in the occupation of a tenant at will either the tenant at will or the immediate landlord could sue. But a landlord who is excluded from possession by a trespasser is not himself in possession: *Holden v. Howard* [1938] 1 K.B. 442, 445.

⁶⁶ See below, § 47.

not a sufficient title to found an action of trespass for the disturbance of that use. Thus, in general a lodger or boarder has no possession of the room in which he is lodged, and cannot sue in trespass for any disturbance of his use of it.⁶⁷ So with a guest at an inn or in a private house, or with a domestic servant or other member of a household. So also with the use of a seat in a theatre or a railway carriage⁶⁸ or the right to post advertisements on a wall or hoarding. Whether a person having thus the use of land without the possession of it has any remedy at all against a stranger who disturbs him is a question which we shall consider later.⁶⁹ In the meantime it is enough to note that he cannot sue as for a trespass to land, or exercise the rights of self-help available in the case of trespassers.⁷⁰ The purchaser, however, of a standing crop or of other things attached to land and removable by the purchaser acquires by his purchase a sufficient possession to enable him to bring an action of trespass *quare clausum fregit* for injury to the thing so purchased: as, for example, when damage is done by cattle straying from adjoining land through defect of fences.⁷¹

Jus tertii no defence in trespass or ejectment

The mere *de facto* and wrongful possession of land is a valid title of right against all persons who cannot show a better title in themselves, and is therefore sufficient to support an action of trespass against such persons. Just as a legal title to land without the possession of it is insufficient for this purpose, so conversely the possession of it without legal title is enough. In other words, no defendant in an action of trespass can plead the *jus tertii*—the right of possession outstanding in some third person—as against the fact of possession in the plaintiff.⁷²

⁶⁷ *Allan v. Liverpool Overseers* (1874) L.R. 9 Q.B. 180, 191–192. This probably applies only to lodgers or guests at an inn to whom no specific room has been assigned: *Lane v. Dixon* (1847) 3 C.B. 776.

⁶⁸ Winfield, *Tort*, p. 362, suggested that a man who reserved a seat, e.g., by leaving his hat on it, gets *de facto* possession, but it is difficult to see how such a case differs from that put by Maule J. (during argument) in *Lane v. Dixon* (1847) 3 C.B. 776, at 784, of the lodger in an inn who has a mere “easement” of sleeping in one room, and eating and drinking in another.

⁶⁹ Below, § 29.

⁷⁰ Below, § 52.

⁷¹ *Wellaway v. Courtier* [1918] 1 K.B. 200.

⁷² *Nicholls v. Ely Beet Sugar Factory* [1931] 2 Ch. 84.

Adversus extraneos vitiosa possessio prodesse solet. It is otherwise, of course, if the defendant is himself the lawful owner⁷³ or has done the act complained of by the authority, precedent or subsequent, of him who is thus rightfully entitled. The same rule holds good in an action of ejectment where the defendant has committed a trespass against the plaintiff. If, therefore, the plaintiff is in possession the *jus tertii* will afford the defendant no answer to the action.⁷⁴ But usually the plaintiff in an action of ejectment is not in possession: he relies upon his right to possession, unaccompanied by actual possession. In such a case, he must recover by the strength of his own title, without any regard to the weakness of the defendant's. The result, therefore, is that in an action of ejectment the *jus tertii* is in practice a good defence. This is sometimes spoken of as the doctrine of *Doe v. Barnard*.⁷⁵

Exceptions

To the general rule there are two exceptions: (1) Whenever a person has acquired possession through another whose title is defective, he cannot set up this defect against that other or anyone claiming through him,⁷⁶ although he may show that such title has since expired or been parted with.⁷⁷ This is an application of the principle of estoppel. The commonest instance is that the lessee is estopped from denying his lessor's title. (2) Probably, if the defendant's possession is wrongful as against the plaintiff, the plaintiff may succeed though he cannot himself show a good title.⁷⁸ For possession is *prima facie* evidence of title. If such *prima facie* evidence is not displaced by proof of title in a third person the plaintiff with prior possession will recover. So in *Asher v. Whitlock* ⁷⁹ where a man inclosed waste land and died without having had 20 years' possession, the heir of his devisee was held entitled to recover it against a person who entered upon it without any title. This decision, although long doubtful, may now be regarded as authoritative in consequence

⁷³ *Delaney v. T. P. Smith Ltd.* [1946] K.B. 393, 397.

⁷⁴ *Davison v. Gent* (1857) 1 H. & N. 744.

⁷⁵ *Doe d. Carter v. Barnard* (1849) 13 Q.B. 945.

⁷⁶ *Doe d. Johnson v. Baytop* (1835) 3 A. & E. 188.

⁷⁷ *Claridge v. MacKenzie* (1842) 4 M. & G. 142.

⁷⁸ *Davison v. Gent* (1857) 1 H. & N. 744.

⁷⁹ (1865) L.R. 1 Q.B. 1.

of its express recognition by the Judicial Committee in *Perry v. Clissold*.⁸⁰

Trespass by relation

He who has a right to the immediate possession of land, and enters in the exercise of that right, is then deemed by a legal fiction to have been in possession ever since the accrual of his right of entry, and may accordingly sue for any trespass committed since that time. This is known as the doctrine of trespass by relation, because the plaintiff's possession relates back to the time when he first acquired a right to the possession. Thus a person wrongfully dispossessed of his land may after re-entry sue for any trespass committed on the land during the period of his dispossession. So a lessee may sue for a trespass done between the granting of the lease and his entry in pursuance of it. So a landlord entitled to re-enter after the termination of the lease may after re-entry sue for any trespass committed since the lease determined.⁸¹ We shall see how the action for mesne profits in case of dispossession is founded on the same rule of trespass by relation.⁸²

Trespass as between co-owners

One tenant in common or joint tenant of land cannot sue his co-tenant in trespass or ejectment unless the act of the defendant amounts either to the total exclusion or ouster of the plaintiff or to destructive waste of the common property.⁸³ For each of the co-tenants is entitled to the possession of the land, to use it in

⁸⁰ [1907] A.C. 73. (Correspondence in the Halsbury Papers reveals that both Lord Halsbury and Lord Davey disapproved of this decision.) In neither of these cases was the *jus tertii* pleaded, although Salmond himself (6th ed., pp. 239-240) accepted them as establishing that the *jus tertii* was no defence. But see Wiren, "The plea of *jus tertii* in Ejectment" (1925) 41 L.Q.R. 139; Hargreaves, "Terminology and Title in Ejectment" (1940) 56 L.Q.R. 376; Holdsworth, 56 L.Q.R. 479.

⁸¹ But only if the defendant is in possession wrongfully. Apparently for that reason the principle does not apply where a tenant is in possession under a lease after a breach of covenant until the landlord determines the lease by some such act as the issue of a writ: *Elliott v. Boynton* [1924] 1 Ch. 236. But see Denning, "Re-entry for Forfeiture" (1927) 43 L.Q.R. 53.

⁸² Below, § 213.

⁸³ *Murray v. Hall* (1849) 7 C.B. 441; Common Law Procedure Act, 1852, s. 189. This section has been repealed by the Statute Law Revision Act, 1883, s. 3, but the principle remains unaffected.

a proper manner, and to take from it the fruits and profits of that user. If one of the owners receives from the common property a larger share of the profits than that to which he is entitled, this is no tort against the other owner, but the proper remedy is an action for an account.

§ 21. Trespass Ab Initio

In 1610 six carpenters entered the Queen's Head Inn in Cripplegate, and consumed a quart of wine (7d.) and some bread (1d.), for which they refused to pay. The question for the court was whether their non-payment made the entry tortious, so as to entitle them to be sued in trespass *quare clausum fregit*. The court held that ⁸⁴: "When entry, authority, or licence is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*," but that the defendants were not liable as their non-payment did not constitute a trespass.

The rule is that the authority, having been abused by doing a wrongful act under cover of it, is cancelled retrospectively so that the exercise of it becomes actionable as a trespass. The rule is primarily one of procedure, the effect of it under the old practice being that a writ of trespass would lie for the entry or seizure itself, instead of a writ of trespass or of case for the subsequent abuse only. In this respect the rule has now lost its significance; but its secondary effect upon the substantive law still remains—*viz.*, that it enables the plaintiff to recover damages for the entire transaction, and not merely for the wrongful portion of it.⁸⁵ The rule has been abolished by statute in the case of distress for rent ⁸⁶ (but not for distress damage feasant) and in certain other instances, and there is no valid reason why it should not now be wholly eliminated from the law.⁸⁷

⁸⁴ (1610) 8 Co.Rep. 146a. See Ames, *Lectures*, pp. 61-63; Holdsworth, H.E.L., vii, pp. 498-501; Williams, "A Strange Offspring of Trespass *ab initio*" (1936) 52 L.Q.R. 106; *ibid.*, *Animals*, pp. 97-100.

⁸⁵ *Ozley v. Watts* (1786) 1 T.R. 12.

⁸⁶ Distress for Rent Act, 1737, s. 19, which creates a new statutory tort of irregular distress.

⁸⁷ But the rule was originally designed to provide a remedy against abuses of authority which might lead to the oppression of the subject: Holdsworth, H.E.L., vii, p. 500; and it might still be useful for this purpose: Denning, *Freedom under the Law*, p. 109.

Limits of the rule

(1) The rule applies only to acts done in pursuance of an "entry, authority, or licence given to anyone by the law." "Where an entry, authority, or licence is given by the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser *ab initio*. And the reason of this difference is, that in the case of a general authority or licence of law, the law adjudges by the subsequent act, *quo animo*, or what intent, he entered; for *acta exteriora indicant interiora secreta*."⁸⁸ (2) The rule applies only when the subsequent abuse amounts to a positive wrongful act, as opposed to a mere omission or non-feasance. Thus in the *Six Carpenters' Case* itself it was resolved that the defendants were not trespassers *ab initio* merely because they refused to pay for the quart of wine and the pennyworth of bread which they bought and consumed in the plaintiff's inn.⁸⁹ (3) A lawful entry does not become by abuse a trespass *ab initio*, unless that abuse has reference to and so takes away the entire ground and reason of the entry. If there remains any independent ground or reason of entry, which is unaffected by the abuse, it will suffice to justify the entry and protect it from the rule of trespass *ab initio*.⁹⁰ Thus in *Elias v. Pasmore*⁹¹ police constables lawfully entered premises to arrest one of the plaintiffs and whilst on the premises took possession of a large number of documents, some rightfully, some wrongfully. It was held that they were

⁸⁸ *Six Carpenters' Case* (1610) 8 Co.Rep. 146b. As Winfield says (*Tort*, p. 384), if a lesser man than Coke had given this for a reason, it would be called nonsense.

⁸⁹ It has been suggested that the true distinction is not between misfeasance and non-feasance, but between acts which do and those which do not under the old practice amount to trespass. It is difficult, however, to reconcile such an interpretation with the authorities. To work a horse which has been lawfully seized damage feasant is not in itself a trespass, but it clearly makes the distrainer a trespasser *ab initio*: *Oxley v. Watts* (1785) 1 T.R. 12. Conversely, to remain on the premises after the determination of a right of entry is a trespass, and yet it seems the better opinion that it does not amount to a trespass *ab initio*.

⁹⁰ *Canadian Pacific Wine Co. v. Tuley* [1921] 2 A.C. 417; *Owen and Smith v. Reo Motors Ltd.* (1934) 151 L.T. 274.

⁹¹ [1934] 2 K.B. 164. If such cases are carried out to their logical consequences they cut down considerably the doctrine of trespass *ab initio* as it was understood in the time of the Six Carpenters.

trespassers only as to the documents which were wrongfully taken, and that they were not liable as trespassers *ab initio* for damage to the premises which they had lawfully entered for the purpose of the arrest.

NUISANCE

§ 22. The Nature of Nuisance ¹

(1) Public and private nuisance

Nuisances are of two kinds, public and private. A private nuisance is a civil wrong, the nature of which we are about to consider. A public or common nuisance is a criminal offence. It is an act or omission which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects.² The question whether the number of persons affected is sufficient to be described as a class is one of fact. One test is to ask whether the nuisance is so widespread in its range or indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings to stop it as distinct from the community at large.³ Examples of a public nuisance are keeping a common gaming-house or a disorderly inn, publicly selling unwholesome provisions, obstructing a highway,⁴ or making it dangerous for traffic. Public and private nuisances are not in reality two species of the same genus at all. There is no generic conception which includes the crime of keeping a common gaming-house and the tort of allowing one's trees to overhang the land of a neighbour. A public nuisance falls within the law of torts only in so far as it may in the particular case constitute some form of tort also. Thus the obstruction of a highway is a public nuisance; but if it causes any special and peculiar damage to an individual, it is also a tort actionable at his suit.⁵ It has been said that an action for a public nuisance

¹ See Holdsworth, H.E.L., iii, pp. 153-157; vii, pp. 324-342; viii, pp. 424-425; Winfield, "Nuisance as a Tort" (1931) 4 Camb.L.J. 189; Fifoot, *History and Sources of the Common Law*, Chaps. 3 and 5; McRae, "Development of Nuisance in the Early Common Law" (1948) 1 Fla.L. Rev. 27; Newark, "The Boundaries of Nuisance" (1949) 65 L.Q.R. 480 (an article commended by Lord Simonds in *Jacobs v. L.C.C.* [1950] A.C. 361, 374); Prosser, *Torts*, Chap. 14; Reed, 28 Can.Bar Rev. 782.

² *Att.-Gen. v. P.Y.A. Quarries, Ltd.* [1957] 2 Q.B. 169, 184.

³ [1957] 2 Q.B. 169, 191.

⁴ This is considered in detail below, § 31.

⁵ Many of the preceding sentences were cited with approval by Croom-Johnson J. in *Lewys v. Burnett* [1945] 2 All E.R. 555, 560.

differs from an action for negligence in that once the nuisance is proved and the defendant is shown to have caused it the onus is shifted on to the defendant to justify or excuse himself.⁶

Private nuisance

Salmond divided private nuisances into two kinds⁷—(1) any wrongful disturbance of an easement or other servitude appurtenant to land, and (2) the act of wrongfully causing or allowing the escape of deleterious things into another person's land—for example, water, smoke, smell, fumes, gas, noise, heat, vibrations, electricity, disease-germs, animals, and vegetation. Examples of each of these forms of nuisance will be found in the following pages. The generic conception involved in nuisance may perhaps be found in the fact that all nuisances are caused by an act or omission, whereby a person is unlawfully annoyed, prejudiced or disturbed in the enjoyment of land; whether by physical damage to the land or by other interference with the enjoyment of the land or with his exercise of an easement, profit or other similar right or with his health, comfort or convenience as occupier of such land.⁸ Nuisance is really a field of tortious liability rather than a single type of tortious conduct: the feature which gives it unity is the interest invaded—that of the use and enjoyment of land.⁹ Thus a judicial definition which has been cited with approval is the following: "Private nuisances, at least in the

⁶ *Southport Corporation v. Esso Petroleum Co., Ltd.* [1954] 2 Q.B. 182, 197. See further below, § 24.

⁷ The explanation of this threefold meaning of the term nuisance is that in its origin it was merely a generic expression meaning wrongful harm, and that although it has now lost this wide signification it has failed to attain instead any single specific application. The term is derived, through the French, from the late Latin *nocentia*: see Tertull.Apol., cap. 40—*Deus innocentiae magister nocentiae iudex*. Chaucer used it in this generic sense: "Helpe me for to weye ageyne the feende. . . . Keepe us from his nusanee." (Mother of God, I, 21.) Nuisance appears in the old Latin pleadings as *nocumentum*—i.e., harm. The terms trespass and tort, though similarly generic in their original use, have been more successful in the process of specification.

⁸ This sentence was cited with approval by Evershed J. in *Newcastle-under-Lyme Corporation v. Wolstanton, Ltd.* [1947] Ch. 92, at 109 (reversed on another point in [1947] Ch. 427). This definition would include cases where there had been no "escape," but the defendant's use of his premises has prejudiced the plaintiff, as in *Dublin (South) City Market Co. v. McCabes, Ltd.* [1958] I.R. 289, 311 (defendants' ice-store abstracting heat from plaintiffs' premises and reducing them "to arctic conditions"), or *Thompson-Schwab v. Costaki* [1956] 1 W.L.R. 835 (use of high-class residential premises for prostitution a nuisance to adjoining occupiers).

⁹ *Morgan v. High Penn Oil Co.* (1953) 238 N.C. 185, 77 S.E. (2d) 682.

vast majority of cases, are interferences for a substantial length of time by owners or occupiers of property with the use or enjoyment of the neighbouring property.”¹⁰

It will be seen that nuisance is an ambiguous word—sometimes it refers to the conduct of the defendant, sometimes to the results of that conduct, and sometimes to such results of that conduct as are actionable.¹¹ But it seems clear that the basis of the law of nuisance is the maxim *sic utere tuo ut alienum non laedas*: a man must not make such use of his property as unreasonably and unnecessarily to cause inconvenience to his neighbour.¹² If we take this wider conception of the generic character of nuisance we are spared the necessity of recourse to the rather artificial treatment of noises, smells, and vibrations as “things” which are allowed to escape.¹³ They are not the subject of property. Property may be had in the thing which makes the noise or vibration or smell, but not in the noise, smell, or vibration itself.¹⁴

(2) Nuisance: where created

A nuisance is commonly created by acts done on land in the occupation of the defendant, adjoining or in the neighbourhood of that of the plaintiff: hence the relevance of the maxim *sic utere tuo ut alienum non laedas*. Yet this is not invariably the case. A nuisance may be created not on the land of the defendant but elsewhere—e.g., on a highway adjoining the plaintiff’s land,¹⁵ or in a navigable river,¹⁶ or in some place of public resort. Even when it is on adjoining private land, the defendant need not be the owner or occupier of that land; he may, for example,

¹⁰ *Cunard v. Antifyre* [1933] 1 K.B. 551, at 556–557, per Talbot J.; *Southport Corporation v. Esso Petroleum, Ltd.* [1954] 2 Q.B. 182; [1953] 3 W.L.R. 773, 776 (Devlin J.).

¹¹ See the (undelivered) judgment of Erle C.J. in *Brand v. Hammersmith Ry.* (1867) L.R. 2 Q.B. 223, 247.

¹² *Aldred’s Case* (1611) 9 Rep. 58, 59a; *Tenant v. Goldwin* (1705) 2 Ld. Raym. 1089, 1092; *Sedleigh-Denfield’s Case* [1940] A.C. 880, 898. This maxim was, however, described by Erle J., in *Bonomi v. Backhouse* (1858) E.B. & E. 622, at 643, as “mere verbiage.” For similar statements see Holmes, *Collected Papers*, p. 120; Lord Wright, *Sedleigh-Denfield’s Case* [1940] A.C., at 903.

¹³ It is doubtful whether Salmond’s requirement of an “escape” really represents the modern law: see *Assagay Quarries (Pty.) Ltd. v. Hobbs*, 1960 (4) S.A. 237, 240, and cases cited in note 8, above.

¹⁴ Pollock, 89 L.Q.R. 145.

¹⁵ *Halsey v. Esso Petroleum Co. Ltd.* [1961] 1 W.L.R. 683.

¹⁶ *Southport Corporation v. Esso Petroleum Co. Ltd.* [1954] 2 Q.B. 182, 204.

be a contractor executing works there which cause a nuisance to adjoining property,¹⁷ or the lessor of the land or premises.¹⁸

(3) Is state of affairs necessary?

Nuisance is commonly a continuing wrong—that is to say, it commonly consists in the establishment or maintenance of some state of things which continuously or repeatedly causes the escape of noxious things onto the plaintiff's land (e.g., a stream of foul water, or the constant noise or smell of a factory). An escape of something on a single occasion would not ordinarily be termed a nuisance. Thus in *Stone v. Bolton*,¹⁹ the plaintiff, while standing on the highway, was injured by a cricket ball struck from the defendants' field. Oliver J. said: "An isolated act of hitting a cricket ball onto a road cannot, of course, amount to a nuisance. The very word connotes some continuity. . . . A nuisance must be a state of affairs, however temporary, and not merely an isolated happening." But it seems better to say that in such a case the gist of the claim in nuisance is not the isolated act of hitting a ball into the highway but the organising or carrying on of a game on property adjacent to the highway whereby the public right of passage is rendered dangerous,²⁰ and the fact that balls reach the highway only very occasionally is evidence that no dangerous state of affairs exists in the adjoining field. For this would enable us to explain cases of good authority in which the plaintiff has recovered for damage to his property caused by an isolated escape of a dangerous thing—water,²¹ gas²² or fire.²³ Again, it has been rightly pointed out that "an intermittent noise, particularly when it does not come at stated intervals, is likely to be more

¹⁷ See below, § 27.

¹⁸ See below, § 27.

¹⁹ [1949] 1 All E.R. 237, 238; [1950] 1 K.B. 201 (C.A.); [1951] A.C. 850. (The claim in nuisance was not pursued in the House of Lords.)

²⁰ This seems to have been the approach of the Court of Appeal (see, specially, Somervell L.J. in [1950] 1 K.B. at p. 213). Cf. *Castle v. St. Augustine's Links Ltd.* (1922) 38 T.L.R. 615 (golf balls frequently sliced into highway from adjoining tee a nuisance).

²¹ *Rylands v. Fletcher* (1866) L.R. 1 Ex. 265 is of course the model of such a case.

²² *Midwood & Co. Ltd. v. Manchester Corporation* [1905] 2 K.B. 597; *Northwestern Utilities Ltd. v. London Guarantee & Accident Co. Ltd.* [1936] A.C. 108.

²³ *Spicer v. Smees* [1946] 1 All E.R. 489.

disagreeable than if it were constant.”²⁴ It has never been seriously suggested that the plaintiff whose house has been flooded or blown up as a result of the defendant’s activities can recover only for the second or subsequent but not the first of such incidents. The truth is that all wrongful escapes of deleterious things, whether continuous, intermittent, or isolated, are equally capable of being classed as nuisances.²⁵ The type of harm caused by the escape,²⁶ the gravity of that harm, and the frequency of its occurrence are each relevant (but not conclusive) factors in determining whether the defendant has maintained on his premises a state of affairs which is a potential nuisance.

(4) Who can sue²⁷

A private nuisance, like trespass,²⁸ is actionable only at the suit of him who is in possession of the land injuriously affected by it. The earliest remedies for nuisance were the assize of nuisance and the writ of *quod permittat prosternere* to authorise the plaintiff to abate the nuisance. These actions were only available for and against freeholders and gave way to an action on the case for nuisance. But the action is still given to a man *qua* owner of land or of rights in connection with land.²⁹ So a weekly tenant³⁰ or a tenant at will³¹ may maintain an action for nuisance, though the duration of the tenancy may be relevant to the question whether and on what terms an injunction should be granted. Conversely, a reversioner has no cause of action unless he can prove a permanent injury to his proprietary right.³² Nor can the owner of a ship at anchor or in berth sue in private as distinct from public nuisance.³³ Nor can a person who has merely the use of land, without either the possession of it or any proprietary interest in it, sue for a nuisance, even though he has suffered direct personal or pecuniary damage. Thus in *Malone*

²⁴ *Rapier v. London Tramways Co.* [1893] 2 Ch. 588, at 591, *per* Kekewich J.

²⁵ Yet see *Att.-Gen. v. P.Y.A. Quarries Ltd.* [1957] 2 Q.B. 169, 192.

²⁶ The law of nuisance has always been readier to remedy damage to property than personal injuries.

²⁷ For who may be sued, see below, §§ 26, 27.

²⁸ Above, § 20. Presumably, however, the doctrine of trespass by relation extends by analogy to the wrong of nuisance.

²⁹ *Read v. Lyons (J.) & Co. Ltd.* [1947] A.C. 156, 183.

³⁰ *Jones v. Chappell* (1875) L.R. 20 Eq. 539.

³¹ *Burgess v. Woodstock* [1955] 4 D.L.R. 615.

³² See, for a fuller discussion of the matter, below, § 47.

³³ *The Wagon Mound (No. 2)* [1963] 1 Lloyd’s Rep. 402.

v. Laskey,³⁴ in which a cistern, owing to vibrations caused by an engine on adjoining premises, fell upon and injured the wife of the occupier of some premises, it was held that she could not recover because she had neither a proprietary nor a possessory interest in the premises. There seems no reason, however, why possession without title should not as a general rule be sufficient to enable a plaintiff to succeed in nuisance so that the *jus tertii* cannot be set up as a defence.³⁵

(5) What damage is actionable

This emphasis on the proprietary character of the action has led to some doubts whether damages can be recovered for personal injuries and damage to chattels. There seems to be no case which definitely either affirms³⁶ or denies the right to recover for personal injuries in an action of private nuisance, but the well-established right to recover for personal injuries caused by a public nuisance has been criticised as anomalous.³⁷ It seems probable that damages can be recovered for injuries to chattels.³⁸

Nuisance and trespass

The true relation between nuisance and trespass would seem to be that these wrongs are mutually exclusive, and not partially coincident. Nothing is to be rightly classed as a nuisance if it is really a trespass.³⁹ The chief importance of the distinction is that trespass is actionable *per se*, while nuisance (except in the case of nuisances consisting of injuries to servitudes⁴⁰) is actionable only on proof of actual damage.⁴¹ The test of the distinction is whether under the old practice a writ of trespass would have

³⁴ [1907] 2 K.B. 141. In *Billings (A. C.) & Sons Ltd. v. Riden* [1958] A.C. 240, 254, 264, the Law Lords expressly stated that on this point *Malone v. Laskey* (otherwise overruled, see below, p. 422) was still good authority. See also *Metropolitan Properties Ltd. v. Jones* [1939] 2 All E.R. 202. Perhaps it is because of the proprietary character of the action that liability under it is not dependent on negligence.

³⁵ This sentence was cited with approval by Evershed J. in *Newcastle-under-Lyme Corporation v. Wolstanton Ltd.* [1947] Ch. 92, at 109.

³⁶ Though see *Cunard v. Antifyre Ltd.* [1933] 1 K.B. 551, 567 ("whatever form the injury takes").

³⁷ See below, § 81.

³⁸ *Cunard v. Antifyre Ltd.* [1933] 1 K.B. 551, 567; *Halsey v. Esso Petroleum Co. Ltd.* [1961] 1 W.L.R. 683, 692-693.

³⁹ *Matania v. National Provincial Bank* [1936] 2 All E.R. 633, 647.

⁴⁰ *Nicholls v. Ely Beet Sugar Factory* [1936] Ch. 843.

⁴¹ See also above, § 17.

been available, or only a writ of case⁴²; and this depends on whether the injury is or is not a direct act of physical interference with the plaintiff's land.

§ 23. Damage Essential

No action will lie for a nuisance (other than one consisting of an injury to a servitude) unless it is the cause of actual damage to the plaintiff.⁴³ No man is bound to prevent the escape from his land of things which do no harm. Thus no action will lie against him who allows the branches of his trees to overhang his neighbour's land, or their roots⁴⁴ to grow into his neighbour's soil, unless actual damage is thereby caused.⁴⁵ The adjoining occupier should protect himself against such an invasion by cutting the branches or roots⁴⁶ which project beyond the boundary; and this he may do, even though they are doing him no harm.⁴⁷ A trespass, on the contrary, is actionable *per se*.

Two kinds of damage

The damage that is sufficient to found an action of nuisance may consist either in (1) some interference with the beneficial use of the premises occupied by the plaintiff, or (2) some physical injury to those premises, or to the property of the plaintiff situated thereon. Personal injuries seem not to be properly

⁴² *St. Anne's Well Brewery Co. v. Roberts* (1928) 140 L.T. 1, 6; *Nicholls v. Ely Beet Sugar Factory* [1931] 2 Ch. 84, 86.

⁴³ *Nicholls v. Ely Beet Sugar Factory* [1936] Ch. 343; *Niklaus v. Moort* [1950] E.G.D. 174; R. W. G. Holdsworth in 52 L.Q.R. 463; Fridman, "Definition of Particular Damage in Nuisance" (1953) 2 Univ.W.A. Ann. L.Rev. 490. *Contra*, Macnaghten J. in *Hollywood Silver Fox Farm v. Emmett*, as reported in [1936] 1 All E.R. at 831.

⁴⁴ See Wright, "Tree Roots" [1958] J.P.L. 562.

⁴⁵ *Smith v. Giddy* [1904] 2 K.B. 448. It is possible, however, that in such a case damage might be presumed: *Baten's Case* (1610) 9 Rep. 53b; Halsbury, Vol. xxviii, p. 131. Further, once actionable damage has been caused an injunction may be obtained: *McCombe v. Read* [1955] 2 Q.B. 429. It was once thought that no action lay if the trees had been self-sown and the damage was caused merely by natural growth. Thus in *Reed v. Smith* (1914) 19 B.C.R. 139, at 140, counsel successfully argued that "The defendant did not grow the trees; he did not rot them, and he did not blow them down. This all happened in the course of nature." But there is now liability in nuisance for the escape of things naturally on the land: *Morgan v. Whyatt* [1964] 1 W.L.R. 475. See below, § 125.

⁴⁶ But if he keeps the branches or roots he may be liable in conversion: *Mills v. Brooker* [1919] 1 K.B. 555. See below, § 23.

⁴⁷ *Lemmon v. Webb* [1895] A.C. 1. See also below, § 232.

remediable by an action of nuisance.⁴⁸ Any substantial interference with the comfort or convenience of persons occupying or using the premises is a sufficient interference with the beneficial use of them within the meaning of this rule. A plaintiff who wishes to establish a nuisance to personal comfort has a heavier burden of proof to discharge than one who seeks to show a nuisance to property.⁴⁹

(1) Interference with beneficial use

When an action of nuisance is based on mere discomfort or inconvenience, this discomfort or inconvenience must be substantial—that is to say, it must not be merely trifling or fanciful or such as an average and reasonable man is content to submit to. *De minimis non curat lex*. The rule is well expressed by Knight Bruce V.-C. in *Walter v. Selje*⁵⁰: “Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?” So a church congregation in a poor part of Brighton disturbed by “a buzzing noise” from a power station was without remedy.⁵¹ But the law judges by no Spartan standards. The loss of even one night’s rest is no trivial matter,⁵² nor is the loss of the opportunity to lie quietly in bed on Sunday morning.⁵³ Nor need injury to health be proved.⁵⁴ On the other hand, interference with recreational facilities, *e.g.*, the right to receive television, is not as seriously regarded as interference with health and physical comfort.⁵⁵

⁴⁸ See above, § 22; below, § 31.

⁴⁹ *Gaunt v. Fynney* (1872) L.R. 8 Ch. 8, 11–12.

⁵⁰ (1851) 4 De G. & Sm. 315, at 322. Similar cases are *Jones v. Powell* (1628) Palm. 536, 538 (“Si home est cy tendernosed, que ne poit indurer sea-cole, il doit lesser son mease”); *Pembroke (Earl of) v. Warren* [1896] 1 I.R. 76.

⁵¹ *Heath v. Mayor of Brighton* (1908) 24 T.L.R. 414.

⁵² *Andreae v. Selfridge & Co.* [1938] Ch. 1, 8, *per* Greene M.R. (This case is also an interesting authority on judicial notice, for Greene M.R. “made considerable use in his judgment of his acquaintance with the *va et vient* of west-end hotels”: Landon, 59 L.Q.R. 185.)

⁵³ *Haddon v. Lynch* [1911] V.L.R. 230.

⁵⁴ *Crump v. Lambert* (1867) L.R. 3 Eq. 409, 412.

⁵⁵ *Bridlington Relay Ltd. v. Yorkshire Electricity Board* [1965] 2 W.L.R. 349.

The standard of comfortable living which is thus to be taken as the test of a nuisance is not a single universal standard for all times and places, but a variable standard differing in different localities. The question in every case is not whether the individual plaintiff suffers what he regards as substantial discomfort or inconvenience, but whether the average man who resides in that locality would take the same view of the matter. The law of nuisance does not guarantee for any man a higher immunity from discomfort or inconvenience than that which prevails generally in the locality in which he lives. He who dislikes the noise of traffic must not set up his abode in the heart of a great city. He who loves peace and quiet must not live in a locality devoted to the business of making boilers or steamships. Thus in *Sturges v. Bridgman*⁵⁶ Thesiger L.J. said: "What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey." In *Polsue & Alfieri Ltd. v. Rushmer*⁵⁷ this doctrine of the local standard of comfort was definitely accepted by the Court of Appeal and the House of Lords.⁵⁸

(2) Interference with property

The rule that the standard is determined by the locality where the nuisance is created is limited to those cases where the nuisance complained of is productive of sensible personal discomfort. A different principle applies where the nuisance causes a material injury to property, or sensibly reduces its value. The distinction was drawn in the classic judgment of Lord Westbury L.C. in *St. Helens Smelting Co. v. Tipping*⁵⁹:

"It appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom,

⁵⁶ (1879) 11 Ch.D. at 865.

⁵⁷ [1907] A.C. 121.

⁵⁸ The lowering of the standard of comfort in particular localities does not depend on the existence of prescriptive rights to create nuisances there: *Rushmer v. Polsue & Alfieri Ltd.* [1906] 1 Ch. 234, 251.

⁵⁹ (1865) 11 H.L.C. 642, at 650.

anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. . . . But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property.”

In this case the plaintiff succeeded on proof that his trees and shrubs had been damaged by the fumes from the defendant's smelting works: the plea that the locality in question was devoted to works of this kind was unsuccessful.⁶⁰ The border-line between these two classes has not been clearly drawn: noise and smoke may not only interfere with personal comfort but also make the premises uninhabitable for the purpose of the business carried on there and so cause “sensible injury to the value of the property.”⁶¹

The temporary nature of the inconvenience or discomfort is a fact to be taken into account in judging whether it is sufficiently substantial to amount to a nuisance.⁶² But if it is otherwise substantial, it is nonetheless a nuisance because it is merely temporary, evanescent, fleeting or occasional.⁶³ It is not time but the effect on the plaintiff which is significant.

Actual damage

The damage complained of in an action of nuisance must be actual and not merely prospective. Until damage is caused there

⁶⁰ See below, § 24.

⁶¹ *Hammersmith Ry. Co. v. Brand* (1869) L.R. 4 H.L. 171; *Russell Transport Ltd. v. Ontario Malleable Iron Co. Ltd.* [1952] 4 D.L.R. 719.

⁶² *Matania v. National Provincial Bank* [1936] 2 All E.R. 638, 644.

⁶³ *Fritz v. Hobson* (1880) 14 Ch.D. 542, 556; *Matania v. National Provincial Bank Ltd.* [1936] 2 All E.R. 633.

is no nuisance, only the potentiality of a nuisance.⁶⁴ If the defendant's operations do not now cause harm, discomfort, or inconvenience, they do not constitute a nuisance, even though they would certainly produce such effects were the plaintiff to have occasion in the future to use his land in some other way.⁶⁵ Substantial present damage must be shown. "It would be wrong, as it seems to me," said James L.J. in *Salvin v. North Brancepeth Coal Co.*,⁶⁶ "for this court in the reign of Henry VI to have interfered with the further use of sea coal in London, because it had been ascertained to their satisfaction, or predicted to their satisfaction, that by the reign of Queen Victoria both white and red roses would have ceased to bloom in the Temple Gardens."

Sensitive plaintiffs

No action will lie for a nuisance in respect of damage which, even though substantial, is due solely to the fact that the plaintiff is abnormally sensitive to deleterious influences, or uses his land for some purpose which requires exceptional freedom from any such influences. Every person is entitled to do on his own land anything that does not interfere with other persons in the ordinary enjoyment of life or the ordinary modes of using property. In other words, his neighbours have a right to the ordinary conditions of comfortable existence, and to the ordinary conditions of the beneficial use of property; but they have a right to nothing more. Extraordinary and special requirements are not protected by the law of nuisance. If a man is morbidly sensitive to noise, so that he is prevented from working or sleeping by noises which would not annoy other people, this is indeed substantial damage inflicted upon him, but is not actionable as a nuisance. So Lord Selborne L.C., after referring to counsel's "happy use of a passage in a recent work upon mental science," said: "A nervous, or anxious, or prepossessed listener hears sounds which would otherwise have passed unnoticed, and magnifies and exaggerates into some new significance, originating within himself, sounds which at other times would have been passively heard

⁶⁴ *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880, 896, 919-920; *Pemberton v. Bright* [1960] 1 W.L.R. 486.

⁶⁵ *Sturges v. Bridgman* (1879) 11 Ch.D. 852.

⁶⁶ (1874) L.R. 9 Ch. 705, at 709.

and not regarded.”⁶⁷ Similarly, the law of nuisance does not guarantee to a sick man any further exemption from the noise of traffic in the street than it guarantees to him who is well. “A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure.”⁶⁸ Thus in *Robinson v. Kilvert*⁶⁹ the plaintiff could not recover for damage done by the heat from the defendants’ pipes to his stock of brown paper—“an exceptionally delicate trade”—since it would not have prejudicially affected any ordinary trade.⁷⁰ But once nuisance has been established, the remedies of damages or an injunction may be available to protect the plaintiff’s unusually delicate or sensitive trade.⁷¹

§ 24. Ineffectual Defences

We must consider six cases⁷²:

(1) *Volenti non fit injuria* and contributory negligence

It is well settled that it is no defence that the plaintiff himself came to the nuisance. It was, indeed, at one time supposed that no one could complain of a nuisance if with full knowledge of its existence he chose to become the owner or occupier of the land affected by it: as if he knowingly took a house close to a noisy factory. This, however, is not the law. The maxim *volenti non fit injuria* is capable of no such application.⁷³ It would be unreasonable to expect a person to refrain from buying land merely because a nuisance already exists there. If we may assume that the defence of contributory negligence is available

⁶⁷ *Gaunt v. Fynney* (1872) L.R. 8 Ch.App. 8, at 13.

⁶⁸ *Eastern and South African Telephone Co. v. Cape Town Tramways* [1902] A.C. 381, 393 (a case on the rule in *Rylands v. Fletcher*). *Contra*, *National Telephone Co. v. Baker* [1893] 2 Ch. 186, 202.

⁶⁹ (1889) 41 Ch.D. 88. The question is discussed in *Hoare & Co. v. McAlpine* [1923] 1 Ch. 167 (very old but not abnormally unstable house).

⁷⁰ This paragraph and the first sentence of the last paragraph were cited by Brand J. in *Amphitheaters, Inc. v. Portland Meadows* (1948) 184 Or. 336, 198 P. (2d) 847.

⁷¹ *McKinnon Industries Ltd. v. Walker* [1951] 3 D.L.R. 577, 581, *per* Lord Simonds (growing orchids).

⁷² This summary was referred to in *Russell Transport Ltd. v. Ontario Malleable Iron Co. Ltd.* [1952] 4 D.L.R. 719, 728. For the defences of necessity and statutory authority, see above, §§ 11, 16.

⁷³ *Elliotson v. Feetham* (1835) 2 Bing.N.C. 134; *Bliss v. Hall* (1838) 4 Bing.N.C. 183; *Sturges v. Bridgman* (1879) 11 Ch.D. 852.

in cases of nuisance,⁷⁴ the same reason would prevent this defence being successful in such a case: for the plaintiff would not have been shown to have failed to take reasonable care for his own safety.⁷⁵ In general it may be said that the standard of care to which the plaintiff is required to conform if he is not to be convicted of contributory negligence is not necessarily as high as that required of the defendant. So a person using a highway which he is entitled to expect will be free from nuisances is in much the same position as a workman in a factory: thoughtlessness or carelessness is not equivalent to contributory negligence.⁷⁶

(2) Public benefit

It is no defence that the nuisance, although injurious to the individual plaintiff, is beneficial to the public at large. A nuisance may be the inevitable result of some manufacture or other operation that is of undoubted public benefit—a benefit that far outweighs the loss inflicted upon the individual—but it is an actionable nuisance nonetheless. No consideration of public utility can be suffered to deprive an individual of his legal rights without compensation.⁷⁷

(3) Suitable place

Nor is it any defence that the place from which the nuisance proceeds is a suitable one for the purpose of carrying on the operation complained of, and that no other place is available in which less mischief would result. If no place can be found where such a business will not cause a nuisance, then it cannot be carried on at all, except with the agreement of adjoining proprietors or under the sanction of an Act of Parliament.⁷⁸ This rule, however, is to be read in the light of the principle already considered⁷⁹ to the effect that the test of a nuisance causing personal

⁷⁴ The assumption was made in the C.A. in *Trevett v. Lee* [1955] 1 W.L.R. 1118 (a case of public nuisance). *Butterfield v. Forrester* (1809) 11 East 60 seems to have been a case of nuisance, although always regarded as a leading case on contributory negligence.

⁷⁵ See Williams, *Joint Torts*, s. 56.

⁷⁶ *Farrell v. John Mowlem & Co. Ltd.* [1954] 1 Lloyd's Rep. 437, 441.

⁷⁷ *Shelfer v. City of London Electric Lighting Co.* [1895] 1 Ch. 287, 316; and below, § 223.

⁷⁸ *St. Helens Smelting Co. v. Tipping* (1865) 11 H.L.C. 642.

⁷⁹ Above, § 23.

discomfort, as distinct from damage to property, is the actual local standard of comfort, and not an ideal and general standard.

(4) Care and skill

In some cases dicta can be found which say that the tendency of modern law is to assimilate nuisance and negligence and to move away from strict liability,⁸⁰ but many other cases have made it plain that nuisance is not a branch of the law of negligence.⁸¹ "Herein lies the great merit of framing the case in nuisance as distinct from negligence. It greatly affects the burden of proof. It puts the legal burden where it ought to be, on the defendant, whereas in negligence it is on the plaintiff."⁸² In nuisance the onus is on the defendant to exculpate himself.⁸³ Much of the confusion here is due to the fact that in negligence attention is directed to the defendant's conduct, but in nuisance to the results of that conduct.⁸⁴ In the case of continuing nuisances, where the defendant himself or someone for whom he is responsible has created the nuisance,⁸⁵ it is no defence that all possible care and skill are being used to prevent the operation complained of from amounting to a nuisance, though the exercise of reasonable care to prevent annoyance may be relevant in determining whether a nuisance arising in the course of the ordinary user of land is actionable. If an operation cannot by any care and skill be prevented from causing a nuisance, it cannot lawfully be undertaken at all, except with the consent of those injured by it or by the authority of a statute. Thus it is an actionable nuisance at common law to run a locomotive engine which cannot by any skill in construction or care in management be

⁸⁰ *British Road Services Ltd. v. Slater* [1964] 1 W.L.R. 498, 504.

⁸¹ *Cunard v. Antifyre Ltd.* [1933] 1 K.B. 551, 558; *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880, 904; *Spicer v. Smee* [1946] 1 All E.R. 489, 498; *Jacobs v. L.C.C.* [1950] A.C. 361, 374; *Farrell v. John Mowlem & Co. Ltd.* [1954] 1 Lloyd's Rep. 437, 440. Yet in *Longhurst v. Metropolitan Water Board* [1948] 2 All E.R. 834, at 839, Lord Porter said that "liability for nuisance without negligence or deliberate act is not readily established, apart, of course, from cases of the *Rylands v. Fletcher* type." And in *Bolton v. Stone* [1951] A.C. 850 it was conceded by the plaintiff that her claim in nuisance would not succeed unless negligence were proved. But both these cases involved personal injuries arising from user of the highway, where different considerations may apply: *Lloyd*, 14 M.L.R. 503.

⁸² *Morton v. Wheeler*, *The Times*, February 1, 1956, C.A. 33, per Denning L.J.

⁸³ *The Wagon Mound (No. 2)* [1963] 1 Lloyd's Rep. 402, 428.

⁸⁴ *Prosser, Torts*, p. 595.

⁸⁵ It may be otherwise if the defendant has not created it: below, § 26.

prevented from discharging sparks; and in the absence of statutory authority he who does so is liable for the consequences, however careful he may have been to prevent them.⁸⁶

(5) Contributory acts of others

It is no defence that the act of the defendant would not amount to a nuisance unless other persons acting independently of him did the same thing at the same time.⁸⁷ Thus if twenty factories pour out smoke and fumes into the atmosphere, the contribution of each may be so small and its detrimental effect so inappreciable that it does not *per se* amount to a nuisance. Yet the aggregate quantity may be the cause of serious harm or discomfort. In such a case each of the contributors is liable for a nuisance and for his own proportion of the total damage.⁸⁸

(6) Reasonable use of property

He who causes a nuisance cannot avail himself of the defence that he is merely making a reasonable use of his own property. No use of property is reasonable which causes substantial discomfort to other persons, or is a source of damage to their property.⁸⁹ "If a man creates a nuisance, he cannot say that he is acting reasonably. The two things are self-contradictory."⁹⁰ It is also well settled that in nuisance the wrongful character of the defendant's act is not to be tested, as it is in negligence, by asking whether he could have foreseen the damage.⁹¹ It has been said that "the proper angle of approach to a case of alleged nuisance is rather from the standpoint of the victim of the loss or inconvenience than from the standpoint of the alleged offender . . . The critical question is whether what he

⁸⁶ *Powell v. Fall* (1880) 5 Q.B.D. 597. See also *Adams v. Ursell* [1913] 1 Ch. 269 (fried fish shop using "the most approved appliances"). So damages are recoverable as well for the damage which is done before as that done after the defendant knows that harm is being done: *Bell v. Twentymen* (1841) 1 Q.B. 766.

⁸⁷ *Lambton v. Mellish* [1894] 3 Ch. 163. There is no joint liability in such cases; each is severally liable for his own act.

⁸⁸ *Pride of Derby and Derbyshire Angling Association Ltd. v. British Celanese Ltd.* [1952] 1 All E.R. 1326, 1342 (not considered at [1953] Ch. 149).

⁸⁹ *Bamford v. Turnley* (1882) 3 B. & S. 66; *Vanderpant v. Mayfair Hotel Co.* [1930] 1 Ch. 188, 166.

⁹⁰ *Att.-Gen. v. Cole* [1901] 2 Ch. 205, at 207, *per* Kekewich J.

⁹¹ *The Wagon Mound (No. 2)* [1963] 1 Lloyd's Rep. 402, 435.

was exposed to was *plus quam tolerabile* when due weight has been given to all the surrounding circumstances of the offensive conduct and its effects.”⁹²

Give and take

This rather confusing use of the term “reasonable” in the cases is due to the failure to distinguish between the proposition to be proved and the means of proving that proposition. If the defendant has created a nuisance, it is actionable; but the “reasonableness” of his conduct is relevant in determining whether he has in truth created a nuisance. For “a balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with.”⁹³ Therefore there is an exception to the general rule in the case of acts reasonably done which are necessary for the common and ordinary use of land and houses. In *Bamford v. Turnley*⁹⁴ Bramwell B. said: “Those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently⁹⁵ done, without subjecting those who do them to an action. . . . It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour’s land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, and live and let live.”⁹⁶ Instances given of such non-actionable nuisance were the burning of weeds, emptying of cesspools and making noises during repairs. So if a man pulls down his house for the purpose of building a new one, he causes considerable inconvenience to his next-door neighbours during the process of demolition, but he is not responsible as for a nuisance if he uses all reasonable skill and care to avoid annoyance by the works of demolition.⁹⁷

⁹² *Watt v. Jamieson*, 1954 S.C. 56, at 57–58, *per* Lord Cooper.

⁹³ *Sedleigh-Denfield v. O’Callaghan* [1940] A.C. 880, at 903, *per* Lord Wright.
⁹⁴ (1862) 3 B. & S. 62, at 83–84.

⁹⁵ *i.e.*, using all reasonable care and skill.

⁹⁶ The preceding sentences were cited with approval by Birkett L.J. in *Trevett v. Lee* [1955] 1 W.L.R. 113, 122.

⁹⁷ *Andreae v. Selfridge* [1938] Ch. 1, 5–6.

Malicious nuisance

But in these cases "reasonable" must be understood in a subjective as well as an objective sense. Therefore if acts otherwise justified on the ground of reciprocity are done wantonly or maliciously the basis of the defence is gone and the defendant cannot use the plea to shield his wanton or malicious conduct. So in *Christie v. Davey*⁹⁸ an injunction was granted against hammering and the beating of trays against a party wall and other noises which were maliciously intended to cause discomfort to the occupier of the adjoining house, although, had they been made for a legitimate purpose, the discomfort would not have been sufficiently substantial to be actionable, or at any rate to give grounds for an injunction. Similarly, in *Hollywood Silver Fox Farm Ltd. v. Emmett*,⁹⁹ damages and an injunction were granted when the defendant ordered his son to fire guns on his own land as near as possible to the plaintiffs' breeding pens in order that the latter's vixen might refuse to breed or miscarry, though clearly he was entitled to shoot on his own land to keep down rabbits or for pleasure. Again, although a person who has a telephone may in general use it to call whomsoever he likes, he may be liable if, by way of retaliation for a real or fancied grievance, he persistently and deliberately makes calls for the purpose of disturbing and vexing another.¹ These cases at first sight seem inconsistent with the general principle that the presence of malice does not render that actionable which without malice would not have been actionable. But the inconsistency is apparent rather than real. Malice negatives the excuse as in defamation malice destroys the privilege of the occasion.²

§ 25. The Legalisation of Nuisances by Prescription

The right to commit a private nuisance may be acquired by prescription. In order to establish such a claim the defendant must show that in doing the acts complained of he was acting

⁹⁸ [1893] 1 Ch. 316.

⁹⁹ [1936] 2 K.B. 468; more fully reported [1936] 1 All E.R. 825. See also *MacGibbon v. Robinson* [1952] 4 D.L.R. 142 ("downright cussedness").

¹ *Stoakes v. Brydges* [1958] Q.W.N. 5.

² Goodhart in 52 L.Q.R. 460; 53 L.Q.R. 3; Fridman, "Motive in the English Law of Nuisance" (1954) 40 Va.L.R. 583. Holdsworth, 53 L.Q.R. 1. and Landon in Pollock, *Torts*, p. 308 n. (30), disapprove of the *Hollywood Fox Farm* case.

openly and to the knowledge of the owner of the servient tenement.³ Subject to these conditions, after a nuisance has been continuously in existence for twenty years, a prescriptive right to continue it is acquired as an easement appurtenant to the land on which it exists. On the expiration of this period the nuisance becomes legalised *ab initio*, as if it had been authorised in its commencement by a grant from the owner of the servient land.⁴ It is not sufficient, however, that the operations of the defendant which now cause the nuisance have been continued for the space of twenty years; they must have been a *nuisance* for that period. The time runs, not from the day when the cause of the nuisance began, but from the day when the nuisance began. In *Sturges v. Bridgman*⁵ the defendant had for more than twenty years used certain heavy machinery in his business as a confectioner. His premises in Wigmore Street adjoined the lower end of the garden of the plaintiff, a physician in Wimpole Street. Some short time before the action the plaintiff built a consulting room at the foot of his garden, and then found that in the use of it he was seriously inconvenienced by the noise of the defendant's machinery. The defendant pleaded a prescriptive right, but the defence was held insufficient, because there had been no actual nuisance until the erection of the plaintiff's consulting room, and until then he had had no right of action. It follows from the same principle that the nuisance must for twenty years have been a nuisance to the plaintiff or his predecessors in title, and that it is not enough that it has been for that period a nuisance to other people in the occupation of other property. The right can be acquired only against specific property, not against all the world.

No public nuisance can be legalised by prescription. Thus, no operation which constitutes a nuisance to a highway can become lawful by any lapse of time.⁶ "No one can make a stable-yard of the king's highway."⁷ "It is an established maxim that once a highway, always a highway."⁸ Nor where

³ *Liverpool Corporation v. Coghill (H.) & Son Ltd.* [1918] 1 Ch. 307.

⁴ *Sturges v. Bridgman* (1879) 11 Ch.D. 852, 863.

⁵ (1879) 11 Ch.D. 852.

⁶ *R. v. Cross* (1812) 3 Camp. 224.

⁷ 3 Camp. at 227, *per* Lord Ellenborough C.J.

⁸ *Per* Joyce J. in *Harvey v. Truro R.D.C.* [1903] 2 Ch. 638, at 644.

the right claimed is in contravention of a statutory prohibition can it be legalised by prescription.*

§ 26. Who is Liable: (1) Occupier

Speaking generally, the occupier of premises is liable for all nuisances which exist upon them during the period of his occupancy.¹⁰ His duty is not merely to refrain from positive acts of misfeasance which cause a nuisance, but also to take care that a nuisance does not come into existence, and to abate it if it does. "I have the control and management," said Sir Charles Abbott C.J.,¹¹ "of all that belongs to my land or my house, and it is my fault if I do not so exercise my authority as to prevent injury to another." Hence an occupier may be responsible for what is done, not only by his servants or (in some cases) independent contractors,¹² but also by his invitees or licensees. So in *White v. Jameson*¹³ the occupier of land was held liable for a nuisance caused by a licensee through the burning of bricks upon the premises. The reason is that an owner of private property, if he likes to take the necessary measures, can prevent people coming on his land and committing a nuisance, because he can shut everyone out if he so wishes.¹⁴ Similarly, an occupier is liable even for a continuing nuisance which already existed on the premises when he first entered into possession of them. For it is his duty either to refrain from taking possession of such premises, or else to abate the nuisance so soon as he becomes the occupier, whether he knew or ought to have known of it. Thus in *Broder v. Saillard*¹⁵ the tenant of a house was held liable for a continuing nuisance to the adjoining house caused by the percolation of water through an artificial mound of earth which existed on the demised premises at the commencement of the tenancy.

⁹ *Green v. Matthews* (1930) 46 T.L.R. 206.

¹⁰ See Blundell, "Liabilities of Landlord and Tenant in respect of Non-repair. Nuisance, and Dangerous Premises" (1941) 5 *The Conveyancer* 100, 163, 261; Friedmann, "The Incidence of Liability in Nuisance" (1943) 59 L.Q.R. 63.

¹¹ *Laugher v. Pointer* (1826) 5 B. & C. 547, at 576.

¹² See *Odell v. Cleveland House Ltd.* (1910) 102 L.T. 602 and below, § 202.

¹³ (1874) L.R. 18 Eq. 303.

¹⁴ *Hall v. Beckenham Corporation* [1949] 1 K.B. 716, 724.

¹⁵ (1876) 2 Ch.D. 692.

Is liability strict?

We have seen that when the nuisance has been created by the defendant himself or someone for whom he is responsible it is no defence that all possible care and skill have been taken to prevent the operation becoming a nuisance.¹⁶ But when the nuisance has not been created or authorised by the occupier a more lenient rule prevails. "The liability for a nuisance is not, at least in modern law, a strict or absolute liability."¹⁷ The rule is that when a nuisance has been created by the act of a trespasser, or otherwise without the act, authority, or permission of the occupier, as where it is caused by a secret and unobservable operation of nature, the occupier is not responsible for that nuisance unless, with knowledge or means of knowledge of its existence, he suffers it to continue without taking reasonably prompt and efficient means for its abatement.¹⁸ The duty of the occupier is not merely to refrain from positive acts of misfeasance which cause a nuisance, but also to abate a nuisance of the existence of which he knew or ought to have known. But in order to establish liability for continuing a nuisance by failing to prevent it the plaintiff must show that the defendant was in a position to take effective steps to that end.¹⁹ So if a nuisance exists on a highway the duty to abate it is primarily on the local authority and not on the adjoining occupier.²⁰

THREE DIFFERENT CASES

The problem may arise in three different ways.

- (i) *The nuisance may be due to the act of a trespasser or stranger*

This is what happened in *Sedleigh-Denfield's* case.²¹ A trespasser laid a pipe and grating in the defendants' ditch in so inefficient a manner that the grating became choked with leaves, and water overflowed onto the plaintiff's premises. The defendants knew of the existence of the pipe, which drained their

¹⁶ Above, § 24.

¹⁷ *Per* Lord Wright in *Sedleigh-Denfield's Case* [1940] A.C. 880, at 904.

¹⁸ This sentence was approved by Lords Maugham, Romer and Wright in [1940] A.C. at 893, 910, and by Taylor and Owen J.J. in *Hargrave v. Goldman* (1963) 37 A.L.J.R. 277, 279.

¹⁹ *Smeaton v. Ilford Corporation* [1954] Ch. 450.

²⁰ *Penney v. Berry* [1955] 1 W.L.R. 1021.

²¹ [1940] A.C. 880.

own land, and ought to have recognised the possibility of a flood occurring, but (despite the lapse of nearly three years) did nothing to remedy the obstruction. "In my opinion," said Lord Maugham,²² "an occupier of land 'continues' a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable steps to bring it to an end though with ample time to do so. He 'adopts' it if he makes any use of the erections, building, bank or artificial contrivance which constitutes the nuisance." The defendants were held liable because they had both continued and adopted the nuisance. So, too, there may be liability for a noxious substance (*e.g.*, petrol) which seeps through the defendant's premises from those of a third party onto the premises of the plaintiff, if the defendant by taking reasonable steps could have controlled the substance, but fails to do so.²³ But he would not be liable for smoke blown across his land, for "even though one might be informed whence it came and whither it went, no means yet existed for preventing the wind from blowing where it listeth."²⁴

(ii) *The occupier may have taken over the nuisance when he acquired the property*

Instances of this are the cases of the tenant of a house which obstructs the plaintiff's lights,²⁵ and the purchaser of land on which a nuisance exists.²⁶ Thus the occupier of a house is liable for injuries caused by a dangerous unfenced area abutting on the street, if the premises were in that condition when his occupation commenced.²⁷

(iii) *The nuisance may be due to a latent defect*

Here, too, "the occupier or owner is not an insurer,"²⁸ and is not liable if he did not know and could not by the exercise of

²² [1940] A.C. 880, at 894. But you cannot be said to continue that which you cannot by any reasonable means prevent: *Smith v. G.W. Ry.* (1926) 135 L.T. 112.

²³ *Hargrave v. Goldman* (1963) 37 A.L.J.R. 277.

²⁴ *Savoy House (Pvt.) Ltd. v. Salisbury City Council*, 1959 (1) R. & N. 145, at 148, *per* Quenet J.

²⁵ *Roswell v. Prior* (1701) 12 Mod. 635.

²⁶ *Penruddock's Case* (1597) 5 Co.Rep. 100b. In *Penruddock's case* it was said that an occupier is not liable for a mere failure to abate a nuisance which existed at the commencement of his occupation until requested by the plaintiff to abate it.

²⁷ *Wilkins v. Leighton* [1932] 2 Ch. 106.

²⁸ [1940] A.C. 880, at 897, *per* Lord Atkin.

reasonable care have known of the existence of the nuisance. So in *Noble v. Harrison*,²⁹ the occupier of land was held not liable when the branch of a beech tree growing on his land and overhanging a highway suddenly broke off owing to a latent defect not discoverable by any reasonably careful inspection and damaged the plaintiff's motor-coach which was passing along the highway.

An exception: premises on highways

There is, as the authorities stand, one possible exception to this principle. In *Wringe v. Cohen*³⁰ the Court of Appeal decided that where premises on a highway become dangerous and constitute a nuisance, so that they collapse and injure a passer-by or an adjoining owner, the occupier or owner of the premises, if he has undertaken the duty to repair, is answerable, whether he knew or ought to have known of the danger or not.³¹ Damage due to want of repair was distinguished from damage due to the acts of trespassers or to a latent defect, *e.g.*, a secret and unobservable operation of nature such as a subsidence. "Positive act and neglect of duty are thus placed on the same footing."³² "A duty to prevent his house from becoming dangerous from want of repair connotes a duty to inspect and examine, and if a landlord fails to do either, it is right that he should not be allowed to rely upon his want of knowledge. There is nothing latent in the premises becoming in such disrepair as to be in danger of collapse. That was the point in *Wringe v. Cohen*."³³

²⁹ [1926] 2 K.B. 332. "*Noble v. Harrison* saved the beautiful hedgerows of the English countryside": Landon, 56 L.Q.R. 144. See also *Caminer v. Northern and London Investment Trust* [1951] A.C. 88 (no duty to lop wellgrown elm near a highway in absence of anything which would signify danger to the prudent landowner), and *British Road Services Ltd. v. Slater* [1964] 1 W.L.R. 498, where the tree was patently a nuisance, but the occupier was held not liable because he did not appreciate this.

³⁰ [1940] 1 K.B. 229. Further discussion of this case: Friedmann, 59 L.Q.R. 305; Winfield, pp. 472-473, and in 56 L.Q.R. 1; Landon, 56 L.Q.R. 140, and in Pollock, p. 324; Blundell, (1941) 5 *The Conveyancer* 100; Treitel, 14 M.L.R. 347.

³¹ The essence of the decision was so stated by the House of Lords in *Jacobs v. L.C.C.* [1950] A.C. 361, 373, and by Somervell L.J. in *Mint v. Good* [1951] 1 K.B. 517, 524. Yet, as Lord Simonds said in the *Jacobs* case (at 373), "the dispute was between adjoining owners, the premises of one having been damaged by the defective condition and collapse of the other, and references to highway and passer-by were alike strictly unnecessary."

³² [1940] 1 K.B. 229, at 248.

³³ *Spicer v. Smees* [1946] 1 All E.R. 489, at 494, *per* Atkinson J. (who delivered the judgment of the Court of Appeal in *Wringe v. Cohen*).

But this begs the question. Is there a duty in the absence of actual or presumed knowledge? The judgment in *Wringe v. Cohen* was delivered before the hearing in the House of Lords of *Sedleigh-Denfield's* case, but it was not referred to either in the arguments of counsel or in any of the opinions delivered by the Law Lords.³⁴ It is submitted that it is inconsistent with the assumptions underlying the opinions in the later case and, though binding except in the House of Lords,³⁵ cannot be regarded as in accord with true principle, being based on a strained interpretation of the authorities.³⁶ It may, however, be justifiable on the principle that the law of England has always taken particular care to protect those who use a highway.³⁷

Liability after occupation ceases

Does a person who is in occupation of premises on which there is a nuisance, and who is liable for that nuisance by virtue of his occupation, cease to be so liable when he ceases to occupy? Does a vendor of land, for example, put off his responsibility along with his ownership? Or does the liability of a tenant cease with the assignment, surrender, or determination of the lease? On this point there is little authority, but it is submitted that (except in the case of nuisance by positive misfeasance) liability dependent on occupation lasts only so long as the occupation on which it is based. In the case of positive misfeasance,

³⁴ Presumably because at the time notice of appeal had been given in *Wringe v. Cohen*, which was therefore *sub judice*.

³⁵ As on the Court of Appeal in *Heap v. Ind Coope* [1940] 2 K.B. 476, and on Hallett J. in *Cushing v. Walker & Son* [1941] 2 All E.R. 698 (which see on the meaning of "latent defect").

³⁶ *Wringe v. Cohen* might well have been decided on the ground that there was presumed knowledge, for the wall had been in defective repair for three years. Indeed, there can be few cases of want of repair, where the defect is neither latent nor due to the act of a trespasser, in which the occupier has not either knowledge or presumed knowledge. Amongst the cases which appear to support it are the following: *Tarry v. Ashton* (1876) 1 Q.B.D. 814; *Broder v. Saillard* (1876) 2 Ch.D. 692; *Humphries v. Cousins* (1877) 2 C.P.D. 289; *Mullan v. Forrester* [1921] 2 I.R. 412 (though in *Noble v. Harrison* [1926] 2 K.B. 332, 344 Wright J. said that he preferred the dissenting judgment of Moore J.) and *Leanse v. Egerton (Lord)* [1948] K.B. 823. There has been almost as great a diversity of judicial opinion as to the true *ratio decidendi* of *Tarry v. Ashton* (see Friedmann, 59 L.Q.R. 67-68; Winfield in 56 L.Q.R. 2) as there is in the reports. Landon well said (56 L.Q.R. 148) that it is "remarkable that so much importance has been attached to this unconsidered and ill-reported decision."

³⁷ *Mint v. Good* [1951] 1 K.B. 517, 526; *Walsh v. Holst & Co. Ltd.* [1958] 1 W.L.R. 800, 806.

however, this is not so. Liability of this kind is based not on occupancy but on the doing of the act which creates the nuisance; and its continuance, therefore, is independent of the ownership or occupation of the property on which the act is done. Thus he who builds a house which obstructs ancient lights remains liable for the continuance of that obstruction, even after he has sold the property.³⁸

§ 27. Who is Liable: (2) Non-Occupiers

Hitherto we have assumed throughout that the person liable in every case is the occupier of the land on which the cause of injury exists. This, however, although generally true, is not invariably so, nor is it the whole truth, and we have now to deal with the matter more definitely. There are four categories to be considered.

(1) Liability of creator of a nuisance

He who by himself or by his servants by a positive act of misfeasance (as opposed to a mere non-feasance, such as an omission to repair³⁹) creates a nuisance is always liable for it, and for any continuance of it, whether he be the owner, the occupier or a stranger, and notwithstanding the fact that it exists on land which is not in his occupation, and that he has therefore no power to put an end to it. Thus if any building obstructs ancient lights or interferes with any other servitude, the builder is liable no less than the occupier of the land on which the building stands.⁴⁰ Moreover, this liability is a continuing one, extending not merely to the wrongful act itself, but the continuance of the wrongful state of things which results from it. It is no defence that the defendant has no power to abate or put an end to this state of things, for he ought not to have created it.⁴¹

³⁸ *Roswell v. Prior* (1701) 12 Mod. 635.

³⁹ In some cases even an omission to repair will give rise to liability: see above, § 26.

⁴⁰ *Thompson v. Gibson* (1841) 7 M. & W. 456; *Dalton v. Angus* (1881) 6 App.Cas. 740. Cf. *Southport Corporation v. Esso Petroleum Co., Ltd.* [1953] 3 W.L.R. 773, 776 (Devlin J.); [1954] 2 Q.B. 184, 204 (Morris L.J.). *Contra* [1954] 2 Q.B. 184, 196 (Denning L.J.); [1956] A.C. 218, 242 (Lord Radcliffe).

⁴¹ *Thompson v. Gibson* (1841) 7 M. & W. 456.

(2) Liability of landlord who authorises his tenant to create or continue a nuisance

On the same principle the landlord is liable when he has expressly or impliedly authorised his tenant to create or continue the nuisance. In *Harris v. James*⁴² a landlord was held liable for a nuisance caused by the act of his tenant in blasting operations and the burning of lime, on the ground that the land was let to him for that very purpose, which was necessarily a nuisance. If, however, the purpose for which the lease is granted is not such as necessarily to cause a nuisance,⁴³ the landlord is not responsible merely because a nuisance is in fact created by the manner in which the tenant chooses to conduct his operations. On this principle in *Rich v. Basterfield*⁴⁴ it was held that a landlord was not responsible for a nuisance caused by the smoke of defective chimneys: it being possible for the tenant to avoid the commission of the nuisance—as, for example, by the use of coke instead of coal.⁴⁵ Nor in such a case is the landlord to be deemed to authorise the nuisance simply because, with knowledge of its existence, he refrains from exercising his right of determining the tenancy,⁴⁶ or takes no active steps to prevent what is being done.⁴⁷ The automatic continuance of a determinable letting is not a re-letting.⁴⁸ It should be observed that even though the landlord is liable for creation or authorisation his liability is concurrent with and not exclusive of that of the tenant.⁴⁹

(3) Liability of landlord who lets premises with nuisance on them

A further extension of this principle is that a landlord is or may be liable when the nuisance existed at the commencement of the tenancy, and was known or ought to have been

⁴² (1876) 45 L.J.Q.B. 545.

⁴³ *Metropolitan Properties Ltd. v. Jones* [1939] 2 All E.R. 202.

⁴⁴ (1847) 4 C.B. 783.

⁴⁵ In *Harris v. James* (1876) 45 L.J.Q.B. 545, however, this case was criticised in respect of the application of the general principle to the facts: a nuisance being the necessary result of the mode of user contemplated by the landlord—namely, the consumption of coal.

⁴⁶ *Bowen v. Anderson* [1894] 1 Q.B. 164; *Gandy v. Jubber* (1864) 5 B. & S. 78; 9 B. & S. 15.

⁴⁷ This sentence was cited with approval by Shorland J. in *British Office Supplies Ltd. v. Auckland Masonic Institute* [1957] N.Z.L.R. 512, 517.

⁴⁸ *Bowen v. Anderson* [1874] 1 Q.B. 165.

⁴⁹ *Roswell v. Prior* (1701) 12 Mod. 635.

known by the landlord to exist, and the premises were let without any covenant on the part of the tenant to repair or otherwise discontinue or prevent the nuisance.⁵⁰ This is apparently the result of the cases of *Todd v. Flight*⁵¹ and *Gandy v. Jubber*,⁵² as qualified and limited in their operation by the later cases of *Pretty v. Bickmore*⁵³ and *Gwinnell v. Eamer*.⁵⁴ Here also the rule is probably to be regarded as merely an application of the rule as to authorisation. By letting the premises with the nuisance already existing, the landlord is to be deemed to have authorised its continuance, unless he has taken a covenant from the tenant binding him to discontinue it, when perhaps the landlord's own liability ceases.⁵⁵

(4) Owner's liability for breach of covenant to repair

This is a branch of the law which has seen some developments. First, it was long ago held in *Payne v. Rogers*⁵⁶ that the landlord is liable when the nuisance is due to a breach by him of the covenants of the lease: for example, when the premises are allowed by him to fall into a dangerous state of disrepair, and the duty of repair is cast upon him by the terms of the lease. It may seem anomalous that the terms of the contract between landlord and tenant should operate *inter alios*, so as to determine the liability of either of them to third persons; but the rule can probably be explained as merely a special application of the doctrine of authorisation already considered—that is to say, a landlord who himself undertakes the duty of repair and disregards it must be taken to have authorised his tenant to leave the premises in a state of disrepair, and is to be held liable accordingly.⁵⁷

⁵⁰ *St. Anne's Well Brewery Co. v. Roberts* (1928) 140 L.T. 1, 7, *per* Scrutton L.J. See Stallybrass, "The St. Anne's Well Brewery Case" (1929) 45 L.Q.R. 118.

⁵¹ (1860) 9 C.B.(N.S.) 377.

⁵² (1864) 5 B. & S. 78; 9 B. & S. 15.

⁵³ (1873) L.R. 8 C.P. 401.

⁵⁴ (1875) L.R. 10 C.P. 658.

⁵⁵ *Wilchick v. Marks* [1934] 2 K.B. 56, 66. In *Mint v. Good* [1951] 1 K.B. 517, 528, Denning L.J. doubted whether today a landlord could exempt himself by taking from the tenant a covenant to repair. This goes very far: 67 L.Q.R. 148; 14 M.L.R. 349; Pollock, *Torts*, p. 324.

⁵⁶ (1794) 2 H.Bl. 350. Cf. *Wringe v. Cohen* [1940] 1 K.B. 229, 233.

⁵⁷ *Pretty v. Bickmore* (1878) L.R. 8 C.P. 401, 405; *St. Anne's Well Brewery Co. v. Roberts* (1928) 140 L.T. 1, 8.

Secondly, in *Wilchick v. Marks*,⁵⁸ it was held that when there was no agreement between landlords and tenants as to repairs, but the landlords knew that there was adjoining the street a defective shutter on premises over which they had reserved the right to enter and do repairs, they were liable to a passer-by who was injured by the defective shutter. This decision was approved by the Court of Appeal in *Heap v. Ind Coope & Allsopp Ltd.*⁵⁹

Thirdly, in *Mint v. Good*,⁶⁰ the same court held that this principle applied when the landlord impliedly reserved the right to enter and do repairs. It was held that such an implication will be easily made in the case of a weekly tenancy: if nothing is said on the matter both parties will be taken to have contemplated that the premises will be kept in a habitable state of repair and that this task will be performed by the landlord,⁶¹ even though the Rent Restriction Acts have given the tenant a certain fixity of tenure. The courts pointed the way to doing justice in these cases, and Parliament followed their example. The Housing Act, 1961, s. 82, provides that in a lease of a dwelling-house for a term of less than seven years there shall be implied certain repairing covenants by the lessor, in respect both of the exterior of the premises and certain installations in it. By section 38 contracting out of these provisions is forbidden, though the county court may, with the consent of the parties, allow section 32 to be excluded or modified. It should be noted, however, that although the landlord may be liable to a third party he will not necessarily be liable to the tenant himself,⁶² for it is a basic principle that the tenant takes the property as he finds it. These cases show that the law imposes on the owner of property (at any rate if it adjoins a highway) a distinct personal obligation. It has even been suggested that the property-owner cannot rid himself of this obligation by taking a covenant to repair from his

⁵⁸ [1934] 2 K.B. 56.

⁵⁹ [1940] 2 K.B. 476. This case extended the principle in *Wilchick v. Marks* in one respect, for Goddard J. had confined the landlord's liability to cases where he knew of the defect, and in *Heap's* case he did not. But the Court of Appeal held that the necessity for this limitation had been removed by its own decision in *Wringe v. Cohen* [1940] 1 K.B. 229. On this point, see above, p. 104.

⁶⁰ [1951] 1 K.B. 517.

⁶¹ *Ibid.* at 521-523 (Somervell L.J.) and 527 (Denning L.J.).

⁶² *Sleafer v. Lambeth B. C.* [1960] 1 Q.B. 43.

tenant.⁶³ Finally, it should always be remembered that the tenant is not exempt because the landlord is liable.⁶⁴

§ 28. Injuries to Servitudes

We must now deal with those nuisances which consist of the wrongful disturbance of an easement or other servitude appurtenant to land. Servitudes may be classified into easements, profits and licences. A profit entitles its owner to take away and appropriate some part of the produce or substance of the servient land, whereas an easement entitles him merely to the use or benefit of the land without any such appropriation, so that the owner of an easement cannot maintain trespass,⁶⁵ but must sue in nuisance. But the owner of a profit has been held entitled to sue in trespass for disturbance of his enjoyment of it, even though the defendant is the occupier of the land in question.⁶⁶ It is important to remember that the interest which is the subject-matter of an easement must be capable of forming the subject-matter of a grant. It is for this reason that there can be no easement consisting in a right to an uninterrupted view from the windows of a house,⁶⁷ nor can there be any right of privacy amounting to a legal easement—a right, for example, that the owner of a house shall not open windows in it so as to overlook the adjoining garden.⁶⁸ Hence, as we have seen,⁶⁹ an occupier of land is free to erect a wall or fence with the sole object of blocking his neighbour's view, or preventing him from acquiring an easement of light⁷⁰—a “spite-fence” as it is sometimes called.⁷¹ So it could be said that “English law had

⁶³ Above, n. 55.

⁶⁴ So held by Goddard J. in *Wilchick v. Marks* [1934] 2 K.B. 56, 68, adopting Salmond's view as correct.

⁶⁵ *Paine & Co. v. St. Neots Gas Co.* [1939] 3 All E.R. 812, 823.

⁶⁶ *Mason v. Clarke* [1955] A.C. 778.

⁶⁷ “The law don't give an action for such things of delight”: *Aldred's Case* (1611) 9 Rep. 58b.

⁶⁸ *Turner v. Spooner* (1861) 30 L.J.Ch. 801. See also *Victoria Park Racing Co. v. Taylor* (1937) 58 C.L.R. 479 where the High Court of Australia held that it was not a nuisance to broadcast a description of horse races from adjoining land, and the Judicial Committee refused leave to appeal (*The Times*, January 20, 1938). See above, p. 22.

⁶⁹ Above, § 5.

⁷⁰ The Rights of Light Act, 1959, enables an occupier (if he wishes) to register a land charge which has the same effect as a “spite-fence.”

⁷¹ The largest “spite-fence” in Western Europe is probably to be found on the shores of Dublin Bay—a terrace of a dozen six-storey houses, which,

long recognised the duty of occupiers of land not to offend their neighbour's sense of smell or hearing, but had left them lamentably free to offend their neighbour's sense of sight."⁷² Today, however, statutes such as the Public Health Act, 1936, and the Town and Country Planning Act, 1947, have provided wide powers for the protection of the amenities of residential neighbourhoods: the details, however, do not belong to the law of tort.

Servitudes are either natural or acquired. Natural servitudes are those which are naturally appurtenant to land, and therefore require no special mode of acquisition, for example, the right of land, unincumbered by buildings, to the support of the adjoining land. But the right of a building to the support of adjoining land or buildings is an acquired easement. The chief recognised easements are (1) rights of way, (2) rights of entry for any purpose relating to the dominant land, (3) rights in respect of the support of land and buildings, (4) rights of light and air, (5) rights in respect of water, (6) rights to do some act which would otherwise amount to a nuisance to the servient land, (7) rights of placing or keeping things on the servient land. Any act done without lawful justification, either by the owner of the servient land or by a stranger, which interferes with the exercise or enjoyment of any easement or profit is a tort actionable at the suit of him who is in lawful possession of the dominant land or in whom the profit is legally vested in possession.

Possessory title to servitudes. The jus tertii

It is a difficult question to determine how far in the case of disturbance of servitudes mere *de facto* possession is a sufficiently good title against a wrongdoer. Such possession may be of two kinds: (1) The use and enjoyment without legal title of a legal servitude vested in some other person: as when I occupy without title land to which a right of ancient light or a right of way is legally appurtenant. (2) The use and enjoyment *de facto* of benefits of a kind capable of being the subject of a servitude: as when the owner of a house is *de facto* in the possession of support

although handsome in themselves, were erected with the object and effect of destroying the view from a nobleman's country house.

⁷² *McVittie v. Bolton Corporation* [1945] K.B. 281, at 283, per Scott L.J.

afforded to it by the adjoining land, or of the access of light to his windows, no legal right to such support or light having been acquired by grant, prescription, or otherwise.

(1) As to the first of these modes of possession a possessory title to land will bring with it a possessory title to all servitudes legally appurtenant to that land, and a stranger (*i.e.*, any person other than the lawful owner or occupier of the servient land) can no more plead the *jus tertii* in an action for the disturbance of a right of way, light or support than in an action for trespass or nuisance. But can the servient owner himself plead the *jus tertii* of the true dominant owner? Probably in this case a distinction must be drawn between natural and acquired servitudes. In the case of natural servitudes a possessory title is valid even against the servient owner. So in *Nicholls v. Ely Beet Sugar Factory*⁷³ it was held that the *jus tertii* was no defence to an action for polluting a several fishery and damaging the fish. But in the case of acquired servitudes such a title is probably invalid, and the servient owner could plead that the person to whom the servitude had been granted was neither the plaintiff nor any person through whom he claimed. In such a case the plaintiff would have to plead and prove his title to an acquired easement.

(2) The use and enjoyment *de facto* of benefits capable of being the subject of a servitude has, of course, no protection as against the owner of the quasi-servient land; but the question which we have to consider is whether it is not protected *adversus extraneos*. If a trespasser on the adjoining land injures my house by interfering with its *de facto* support, or blocks up my modern windows, will he be permitted to plead that I have acquired no legal or equitable⁷⁴ servitude over the land entitling me to such support or light? The answer to this question is not clear. Some authorities hold that *de facto* enjoyment of an easement is protected against strangers,⁷⁵ but there are dicta in the Court of Appeal the other way.⁷⁶

⁷³ [1931] 2 Ch. 84. But Farwell J. was careful to limit his decision to pollution actions which are "not trespass, but very analogous to trespass."

⁷⁴ See *Mason v. Clarke* [1955] A.C. 778.

⁷⁵ See, *e.g.*, *Keegan v. Young* [1963] N.Z.L.R. 770.

⁷⁶ *Paine & Co. Ltd. v. St. Neots Gas Co.* [1939] 8 All E.R. 812, 823. Salmond discussed the problem fully: 6th ed., p. 302. See also the protection given to licensees: below, § 29.

§ 29. Licences

A licence, in the sense of the term with which we are concerned in this chapter, is an agreement (not amounting to the grant of a lease or easement or *profit à prendre*) that it shall be lawful for the licensee to enter upon the land of the licensor or to do some other act in relation thereto which would otherwise be illegal.⁷⁷ The classical description of a licence was given by Sir John Vaughan C.J. in *Thomas v. Sorrell*⁷⁸: "A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it would have been unlawful. As a licence to go beyond the seas, to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down the tree, but as to carrying away the deer killed and the tree cut down, they are grants."

Lease and licence

Sometimes it is difficult to determine whether the transaction which has given rise to entry upon the premises of another is a lease or a licence. If the transaction is a lease a proprietary interest passes to the lessee; the parties must comply with the conditions prescribed by the Law of Property Act, 1925, s. 40; and the lessee may be able to take advantage of the protection afforded by the Rent Restriction Acts. It is quite clear that the difference between a lease and a licence does not depend on any label which the parties themselves have affixed to the transaction but upon the true interpretation in law of what they have done. The fundamental question is whether the entrant has obtained exclusive possession of the premises; if he has, it is a lease and not a licence. There may be some cases in which a person with

⁷⁷ The term also means an agreement which authorises the licensee to use or enjoy any property of the licensor—e.g., the subject-matter of a patent: *Martin-Baker Aircraft Co. Ltd. v. Canadian Flight Equipment Ltd.* [1955] 2 Q.B. 556.

⁷⁸ (1673) Vaugh. 330, at 351. On this topic see Mitchell, "Learner's Licence" (1954) 17 M.L.R. 211; Hanbury, "Licences: a Jonah's Gourd" [1954] C.L.J. 201; [1955] C.L.J. 47; Hutton, "The Remedy of an Ejected Licensee" (1954) 17 M.L.R. 448; Evershed, "Reflections on the Fusion of Law and Equity" (1954) 70 L.Q.R. 326.

exclusive possession is rightly described as a licensee, but they are very exceptional.⁷⁹

We must consider (1) the effect of the licence as between the parties to it, and (2) the extent to which it binds third parties.

(1) The effect of the licence as between the parties

The main distinction drawn here is between licences coupled with the grant of an interest and bare licences. Licences coupled with an interest (as they are often called) are irrevocable. The interest so conferred may be an interest in realty or a chattel interest, but it must be a proprietary interest of a kind known to the law. "If A sells to B felled timber lying on A's lands, on the terms that B may enter and carry it away, the licence so conferred is irrevocable because it is coupled with and granted in aid of the legal property in the timber which the contract of sale confers on B."⁸⁰ In such a case the licence and the proprietary interest thereby granted are distinct concepts.

Bare licence prima facie revocable

Under a bare licence no interest in property passes: the licensee is simply not a trespasser. A licence of this kind may be either gratuitous or contained in a contract for valuable consideration: in either case at common law it was revocable at the will of the licensor and was therefore no justification for any act done in exercise of it after revocation. This was laid down in 1845 in *Wood v. Leadbitter*⁸¹ and emphatically reaffirmed by the Court of Appeal in 1944 in *Thompson v. Park*.⁸²

In *Wood v. Leadbitter* the occupiers of Doncaster racecourse in breach of their agreement ordered the plaintiff, to whom they had sold a ticket for the races, to leave the premises while the races were going on, and on his refusal to leave they procured his forcible expulsion by their servant, the defendant.

⁷⁹ *Addiscombe Garden Estates Ltd. v. Crabbe* [1958] 1 Q.B. 518.

⁸⁰ *Jones v. Tankerville (Earl)* [1909] 2 Ch. 440, at 442, *per* Parker J. An injunction can be obtained to prevent the wrongful revocation of such a licence: *Frogley v. Lovelace* (1859) John. 833.

⁸¹ (1845) 13 M. & W. 838.

⁸² [1944] K.B. 408. Cases in which a licence was held to have been properly revoked are: *McBean v. Howey* [1958] N.Z.L.R. 25; *Stackman v. Delhi Court Ltd.* (1960) 24 D.L.R. (2d) 162.

In an action for assault the defendant pleaded that the plaintiff was a trespasser. It was held by the Court of Exchequer that the action would not lie. Although the licence had been revoked improperly and in breach of contract its revocation was nonetheless effectual. The plaintiff was a trespasser. It will be noticed that the action was one of tort against the servant of the licensor and not one for breach of contract against the licensor himself. It is well settled⁸³ that an action for breach of contract will lie in such a case even at common law, and notwithstanding *Wood v. Leadbitter*. If, however, the licensee insists, notwithstanding the revocation of his licence (even though it is wrongful as being in breach of contract), in entering or remaining on the land or in otherwise exercising his licence, he becomes at common law a trespasser or other wrongdoer. The rule is an illustration of the difference between a legal *power* to do a thing effectively and a legal *right* or *liberty* to do it lawfully. A licensor has at common law the power to revoke the licence at any time, but he has no right to revoke it before the expiration of the term.⁸⁴

Exceptions

There are two recognised qualifications to the rule in *Wood v. Leadbitter*: (1) A licensee is entitled to a reasonable time in which to remove himself and his property after the licence has been revoked and he cannot be treated as a trespasser until the expiry of that time.⁸⁵ This packing-up period (as it has been usefully called⁸⁶) is available to gratuitous as well as to contractual licensees. It is unnecessary for the licensor in his notice of revocation to specify the period to which the licensee is entitled.⁸⁷ If the licensor gives insufficient, or no, notice of

⁸³ *Kerrison v. Smith* [1897] 2 Q.B. 445; *King v. David Allen & Sons Ltd.* [1916] 2 A.C. 54.

⁸⁴ The preceding paragraph, which has been slightly shortened, was cited with approval by Goddard L.J. in *Thompson v. Park* [1944] K.B. 408, 410.

⁸⁵ *Minister of Health v. Bellotti* [1944] K.B. 298; *Winter Garden Theatre Ltd. v. Millennium Productions Ltd.* [1948] A.C. 173; *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* [1955] 1 W.L.R. 761. And even a trespasser is not entirely without rights: below, § 112.

⁸⁶ *Winter Garden Theatre case*, per Lord MacDermott at 206.

⁸⁷ *Minister of Health v. Bellotti* [1944] K.B. 298; *Isaac v. Hotel de Paris Ltd.* [1960] 1 W.L.R. 239.

revocation, the licensee still cannot ignore the revocation and treat the licence as if it were still subsisting.⁸⁸ In some cases it seems that a licensee may be entitled to reasonable notice of the proposed revocation as well as to the packing-up period.⁸⁹

(2) The premature revocation of a licence imposes no obligation upon the licensee to do any act for the purpose of preventing the continuing effect upon the servient land of any act which he may have lawfully done before the revocation.⁹⁰

Wood v. Leadbitter doubted

Since the fusion of law and equity, according to the decision of the majority of the Court of Appeal in *Hurst v. Picture Theatres Ltd.*,⁹¹ the rule in *Wood v. Leadbitter* has to a very large extent become obsolete. In *Hurst's* case the majority held that the plaintiff, who had purchased from the defendants a ticket entitling him to occupy a seat at a cinema, had a good cause of action in *tort* for the act of the defendants in forcibly removing him from the building under the mistaken belief that he had wrongfully obtained admission without payment. Hence the plaintiff recovered substantial damages as for assault instead of the merely nominal damages which would have been recoverable in an action for breach of contract.⁹² The facts of this case are indistinguishable from those of *Wood v. Leadbitter* itself, yet the decision was to the opposite effect. The majority of the court seem to have adopted the view that the decision in *Wood v. Leadbitter* turned on the absence of a seal and that since the Judicature Acts this ground of decision had become obsolete for all courts would now treat the plaintiff as being in the same position as if the licence had in fact been under seal. But "That

⁸⁸ *Dorling v. Honnor Marine Ltd.* [1963] 2 All E.R. 495, 502 (reversed on another point [1965] Ch. 1).

⁸⁹ *Winter Garden Theatre (London) Ltd. v. Millennium Productions Ltd.* [1948] A.C. 173, 205.

⁹⁰ *Armstrong v. Sheppard and Short Ltd.* [1959] 2 Q.B. 384. But see above, § 18.

⁹¹ [1915] 1 K.B. 1.

⁹² It is generally believed that the damages obtainable by such a licensee in an action for breach of contract are limited to the value of his ticket, either because the assault and battery is too remote a consequence of the breach of contract, or because of the rule in *Addis v. Gramophone Co.* [1909] A.C. 488, which prohibits the award of aggravated damages in an action for breach of contract. If this belief should prove unfounded many of the difficulties mentioned here might disappear.

has no bearing on the question if there is no estate, and no interest in land given by the document relied on.”⁹³ A seal would have made no difference in *Hurst v. Picture Theatres*. The essence of the matter is that the right to enter on premises to see a spectacle is not an interest in land in the ordinary use of legal language: it is not a proprietary interest capable of being the subject-matter of a grant, as is a lease, easement or a *profit à prendre*.⁹⁴ The law has always been reluctant to permit the number of proprietary interests in land to be increased beyond the recognised categories of incorporeal hereditaments for fear lest purchasers should find themselves saddled with unknown and perhaps fanciful burdens.⁹⁵ We may conclude that the decision in *Hurst's* case does not seem consistent with principle: it appears to confound a licence (which is a mere *jus in personam*) with a demise or easement (which creates a *jus in rem*), and ignores the rule that specific performance will not be granted if damages are an adequate remedy or if the court cannot supervise the performance.

Winter Garden Theatre case

It has been said that the fallacy of this criticism of *Hurst's* case lies in its insistence upon discovering a proprietary right as a condition of affording protection to the licensee.⁹⁶ Contracts as well as grants may create irrevocable interests, and so the question whether any restrictions exist on the power of a licensor to determine a revocable licence must depend upon the circumstances

⁹³ *Hurst v. Picture Theatres Ltd.* [1915] 1 K.B. 1, at 18, *per* Phillimore L.J. (dissenting). As Alderson B. himself said: “It may further be observed, that a licence under seal (provided it be a mere licence) is as revocable as a licence by parol” (13 M. & W. at 845).

⁹⁴ *Hurst's* case was followed in *Heller v. Niagara Racing Association* [1925] 2 D.L.R. 286, but not in *Cowell v. Rosehill Racecourse Co.* (1937) 56 C.L.R. 605, by the High Court of Australia (Evvatt J. dissenting). Latham C.J. (at 621–623) pointed out that the arguments *ab inconvenienti* which so impressed the Court of Appeal are not all on one side.

⁹⁵ It is not easy to find authority for this elementary proposition: “But to hold that one of the fundamental doctrines of real property can be called in question because it has not been in terms laid down by a judgment of the House of Lords is, in my opinion, to invest the judicial proceedings of this House with an authority to which they are not entitled. The A B C of the law is generally not questioned before your Lordships, just because it is the A B C”: *Johnston v. O'Neill* [1911] A.C. 552, at 592, *per* Lord Dunedin.

⁹⁶ *Cowell's Case*, 56 C.L.R. at 65, *per* Evvatt J.

of each case.⁹⁷ "The settled practice of the courts of equity is to do what they can by an injunction to preserve the sanctity of a bargain."⁹⁸ This view has received much support since it was adopted by Lord Greene M.R. in the *Winter Garden Theatre* case⁹⁹ as a "rather simple way . . . to get round any difficulties which might be felt as to the reasoning in *Hurst v. Picture Theatres*." The question in this case was whether the appellants were entitled to determine the respondents' licence to use the theatre. The Court of Appeal held that the licence was irrevocable so long as the licensees duly performed their obligations under it and granted an injunction to restrain the licensors from acting on their purported revocation. But the House of Lords took a different view of the construction of the licence and held that it was revocable upon the appellants giving reasonable notice of their intention. Since the respondents were unable to prove that the notice which they had received was unreasonable, it was unnecessary for the House to consider the remedies now available to a licensee whose licence has been improperly withdrawn¹ but it was clearly assumed that in a proper case an injunction could be granted.

The present law

It seems, therefore, that the former rule of law that a licence is revocable despite any contract has been converted into a rule of construction that a licence is *prima facie* revocable subject to the terms of any contract between the parties.² The extent to

⁹⁷ *Minister of Health v. Bellotti* [1944] K.B. 298, 304; *Winter Garden Theatre (London) Ltd. v. Millennium Productions Ltd.* [1948] A.C. 173; *Errington v. Errington* [1952] 1 K.B. 290, 298; *Bendall v. McWhirter* [1952] 2 Q.B. 466, 479; *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* [1955] 1 W.L.R. 761.

⁹⁸ *Winter Garden Theatre Case* [1948] A.C. at 202, *per* Lord Uthwatt.

⁹⁹ [1946] 1 All E.R. 678 at 685.

¹ It is true that (at 191) Lord Simon (alone of the Law Lords) said he regarded *Hurst's* case as rightly decided. Highly authoritative and emphatic though this statement is, it is submitted that it does not conclude the matter. The validity of *Hurst's* case was not before the House and the arguments against it do not seem to have been considered. The dicta of Denning L.J. in *Bendall v. McWhirter* [1952] 2 Q.B. 466, 479, meet with a similar answer.

² Lord Greene ([1946] 1 All E.R. 678, 690) seems to have thought that it was entirely a question of the true construction of the particular contract, but as Lord Porter remarked ([1948] A.C. at 193): "There are few, if any, contracts which can be construed without taking into consideration a long background of gradual development. . . . I do not think the

which the licensor has disabled himself from exercising his power of revocation will have to be ascertained according to the ordinary principles of construction. It may well be that an injunction could be obtained to restrain the revocation of a licence which is intended to extend over a substantial tract of time—*e.g.*, a ticket entitling the holder to admission throughout the season at an open-air racecourse.³ But the courts will also probably be ready to assume that a licence granted for valuable consideration for a limited time and for a limited purpose was intended to be irrevocable until that purpose has been accomplished in the manner contemplated.⁴ If in such a case performance of the act or purpose licensed has actually begun the remedies of declaration or injunction will be available to the licensee to restrain the licensor from either revoking in breach of contract or acting on his purported revocation, as the case may require. So in a proper case a licence to go upon or use or enjoy land may be enforced by way of injunction.⁵ But it is still no easier than before to understand what the law is if the licence is not suitable to be specifically enforced by way of injunction (as in *Thompson v. Park* ⁶), or if the licensee has been actually ejected (as in *Hurst's* case) before the aid of equity can be invoked,⁷ or if he claims only damages and not an injunction.

(2) Effect of the licence on third parties

Since a licence is not a legal servitude, it does not run with the servient land at law so as to bind all subsequent owners

meaning of a licence can be reached by considering the matter, as it were, in the air. Its incidents have a long history behind them."

³ *Evershed M.R.*, 70 L.Q.R. 339-340.

⁴ [1948] A.C. at 194, *per* Lord Porter.

⁵ *Heidke v. Sydney City Council* (1952) S.R.(N.S.W.) 143.

⁶ [1944] K.B. 408 (quarrelling schoolmasters: the courts cannot compel two men to be of one mind in a house). If the licence is not fit to be specifically enforced by way of injunction, neither is it fit to be exercised in defiance of the will of the licensor. Yet, until *Hurst's* case is overruled, this cannot be said to be the law.

⁷ The rather fanciful suggestion (at one time current) that a judge who happened to pass by such an incident might have been persuaded to grant an *ex parte* injunction has been disposed of by Dr. Megarry (1 J.S.P.T.L. 181): under Ord. 50, r. 6, an *ex parte* injunction can only be obtained after the writ in the action has been issued, although it need not have been served. "And even the longest modern film would not have given Hurst time to get an injunction from a Chancery judge and return with his order to the cinema before the end of the showing": *Evershed*, 70 L.Q.R. 333. For suggestions to overcome some of the difficulties, see *Evatt J.* in 56 C.L.R. 650-651; *Wade*, 64 L.Q.R. 62.

of it. At law, indeed, it is a mere agreement, which binds no one save the grantor himself. Such an agreement, however, if of such a nature as to be specifically enforceable, amounts to a good equitable servitude—that is to say, it binds and runs with the land in equity so as to be enforceable not merely against the grantor, but also against all subsequent owners and occupiers of the land except purchasers for value without notice of any such equitable right.⁸ Thus it has been held that a licence to occupy premises is binding on the devisee of the licensor,⁹ and that a deserted wife's right to occupy the matrimonial home¹⁰ is binding on her husband's trustee in bankruptcy,¹¹ and possibly on any person claiming through him save a purchaser without notice. But the House of Lords has now over-ruled these cases.¹²

Yet such an "equity" is enforceable against the third party only in the sense that he will be restrained by injunction from acting inconsistently with it. For although a licensee has an action for damages for breach of contract against the licensor for any disturbance of the licence committed by him, he has no remedy at law against any subsequent owner or occupier or any stranger for a disturbance of his right. This seems to follow logically from the fact that he has no legal estate or interest in the servient land. This was decided in *Hill v. Tupper*,¹³ in which the plaintiff had acquired by grant under the seal of a canal company an exclusive right of keeping pleasure-boats for hire upon the canal. He unsuccessfully sued at law for damages a stranger who infringed this monopoly.

This absence of a remedy by way of damages available to a licensee against a stranger is a very anomalous feature of our

⁸ This sentence was cited with approval by Denning L.J. in *Bendall v. McWhirter* [1952] 2 Q.B. 466. Rights of this kind are outside the scope of the Land Registration Act, 1925, at any rate when the licensee is in actual possession or occupation of the land: *National Provincial Bank Ltd. v. Hastings Car Mart, Ltd.* [1964] Ch. 665. "Must I register my ticket for the theatre in order to be absolutely safe?" asks Mr. C. V. Davidge ("Equitable Easements" (1937) 53 L.Q.R. 259, 261) but reassuringly answers "No." But see also Walford, 11 *The Conveyancer* 165; Wade, 64 L.Q.R. 57 n. (6), and 68 L.Q.R. 337 n. (52); Megarry, 68 L.Q.R. 384-385; Hanbury, [1955] C.L.J. 59-61.

⁹ *Errington v. Errington* [1952] 1 K.B. 290.

¹⁰ See below, § 181.

¹¹ *Bendall v. McWhirter* [1952] 2 Q.B. 466.

¹² *National Provincial Bank Ltd. v. Ainsworth* [1965] 3 W.L.R. 1.

¹³ (1863) 2 H. & C. 121.

law. It seems curious that he who, by agreement with the occupier of a building, has expended money in painting advertisements upon one of its walls should have no civil remedy against a third person who wilfully defaces them.¹⁴ There is, however, one important class of licences to which this rule has no application—namely, those in which the licence is of such a nature that it would, if created by deed or prescription, amount to a legal easement or profit. Thus in *Mason v. Clarke*¹⁵ the appellant had the benefit of an oral agreement entitling him to catch rabbits on the Hothorpe estate (a *profit à prendre*); the House of Lords held that he could recover damages from the respondent for his interference with the exercise of those rights. The distinction between *Hill v. Tupper* and *Mason v. Clarke* is that in the former case “what the plaintiff was trying to do was to set up, under the guise of an easement, a monopoly which had no normal connection with the ordinary use of his land, but which was merely an independent business enterprise.”¹⁶ It is also a question whether the power of courts of equity to grant an injunction to a licensee, taken in conjunction with their power to grant damages in lieu of injunction, does not exclude the rule in *Hill v. Tupper* in all cases in which an injunction can be granted.

§ 30. Rights of Way

Rights of way are either private or public. The former call for no special consideration, for they are governed by the ordinary principles already considered by us in relation to easements in general. Public rights of way, on the other hand, are not easements and demand more particular examination. They are of two kinds, for they exist either over highways or over navigable rivers.¹⁷ The law as to these two is essentially the same.

A highway (including in that term any public way) is a piece of land over which the public at large possesses a right of way. A highway extends to the whole width of the space between the

¹⁴ *King v. David Allen & Sons, Billposting Ltd.* [1916] 2 A.C. 54. Perhaps this decision could be limited to cases in which the licence has not yet been acted on.

¹⁵ [1955] A.C. 778.

¹⁶ *Re Ellenborough Park* [1956] Ch. 181, at 175, per Lord Evershed M.R.

¹⁷ *Esso Petroleum Co. Ltd. v. Southport Corporation* [1956] A.C. 218.

fences or hedges on either side—partly in order to admit light and air to it, and partly because “Macadam’s system of road-making with broken stone was not introduced at the earliest until just before the end of the eighteenth century.”¹⁸ At common law the ownership of a highway is in the owner or owners of the land adjoining it on either side, the highway having been made such by an actual or presumed dedication of it to the use of the public by the proprietors of the land over which it runs. By statute this common law rule has been so far derogated from that certain kinds of highways are now vested in local authorities having the care and management of them. These statutes, however, have been so interpreted as to vest in the local authorities not the whole of the land on which the highway lies *usque ad coelum et ad inferos*, but only so much of it above and below the surface as is reasonably necessary for the efficient construction, care, and use of the highway. The subsoil below and the space above the limits so defined remain as at common law in the owners of the adjoining lands.¹⁹

There are at least four distinct kinds of injury which may be committed in respect of a highway:

- (1) Modes of user amounting to a trespass against the owner of the highway. In dealing with the law of trespass we have already considered this matter.²⁰
- (2) Modes of user amounting to a nuisance to the occupiers of adjoining land—for example, keeping horses or vehicles standing constantly in front of a shop,²¹ or picketing premises during a strike in a violent and menacing way, so as to intimidate and coerce visitors to the premises.²²
- (3) Disturbance of that right of access to the highway which is possessed by every occupier of adjoining premises.
- (4) Public nuisance to a highway—i.e., the unlawful disturbance of the public right of passage or the creation of a danger thereon.

¹⁸ *Harvey v. Truro R.D.C.* [1903] 2 Ch. 638, at 643, *per* Joyce J.

¹⁹ *Wandsworth Board of Works v. United Telephone Co.* (1884) 13 Q.B.D. 904; *Tithe Redemption Commission v. Runcorn U. D. C.* [1954] Ch. 883.

²⁰ Above, § 17.

²¹ *Benjamin v. Storr* (1874) L.R. 9 C.P. 400.

²² *J. Lyons & Sons v. Wilkins* [1899] 1 Ch. 811; *Bird v. O’Neal* [1960] A.C. 907. See below, Chap. 17.

Disturbance of the Rights of Access to a Highway²³

Every person who occupies land immediately adjoining a highway has a private right of access to the highway from his land and vice versa; and any act done without lawful justification whereby the exercise of this private right is obstructed is an actionable wrong.²⁴ This right of access is a private right of property, and if what is complained of is sufficiently substantial to constitute an interference with that right, he may recover at least nominal damages, for it is an example of an action on the case succeeding without proof of special damage.²⁵

At common law a frontager had the right of entrance and exit from his land on to a highway at any point. But this common law right of access has been greatly cut down by statutes (see, for example, the Highways Act, 1959, s. 155), especially since local authorities have had vested in them the surface of the highway.²⁶ Opening up a new access may constitute development for which planning permission is required. The relation of frontagers and the public in regard to access to the highway was stated by Lord Atkin²⁷ as follows: "The owner of land adjoining a highway has a right of access to the highway from any part of his premises. . . . The rights of the public to pass along this highway are subject to this right of access: just as the right of access is subject to the rights of the public, and must be exercised subject to the general obligations as to nuisance and the like imposed upon a person using the highway. . . . The passage of the public along a footway is always liable to be temporarily interrupted by adjoining owners' right of access, whether to the footway or the roadway."

This right of access to a highway by the occupier of land abutting upon it must be distinguished from the right of passing along the highway. The former is a private and the latter a public right, and for any infringement of the former an action will lie; whereas, as we shall see in the next section, no action

²³ See Garner, "Rights in Highways" (1960) 24 *The Conveyancer* 454.

²⁴ *Lyon v. Fishmongers' Co.* (1876) 1 App.Cas. 662; *Barber v. Penley* [1893] 2 Ch. 447; *Benjamin v. Storr* (1874) L.R. 9 C.P. 400; *Vanderpant v. Mayfair Hotel Co.* [1930] 1 Ch. 138.

²⁵ *Walsh v. Ervin* [1952] V.L.R. 361.

²⁶ Cork, "Right of Access to and from the Highway" [1952] J.P.L. 553.

²⁷ *Marshall v. Blackpool Corporation* [1936] A.C. 16. at 22.

will lie for an infringement of the public right of passing except on proof of some special or particular consequential damage suffered by the plaintiff. The private right of access thus protected includes merely the right to get from the highway into the plaintiff's land, and from his land into the highway; and does not include a right to get to and from the plaintiff's land by going along the highway, for this is merely the public right of passage.²⁸ A disturbance of this private right of access may or may not be at the same time a disturbance of the public right of passage. A man's doorway may be obstructed by an act which in no way obstructs the use of the highway; and conversely the highway may be obstructed, while the right of access remains unaffected.²⁹

§ 31. Nuisance to a Highway

The law governing trespass to highways has already been considered.³⁰ A nuisance to a highway consists either in obstructing it or in rendering it dangerous.³¹ The term nuisance is here used in the sense of public nuisance—*i.e.*, an indictable misdemeanour.³² “In order to establish nuisance or obstruction in a public highway something which is indictable—a punishable offence—must be established.”³³ No such nuisance can be legalised by prescription.³⁴ In what circumstances such an act is also a civil wrong actionable at the suit of an individual we are about to consider.

(1) Obstructions to highway

Examples of this are stopping a highway by erecting a fence across it; narrowing it by a fence, scaffolding or hoarding,³⁵ or building which projects beyond the boundary line; leaving horses

²⁸ See *Chaplin v. Westminster Corporation* [1901] 2 Ch. 329.

²⁹ *Walsh v. Ervin* [1952] V.L.R. 361.

³⁰ See above, § 17.

³¹ This sentence was cited with approval in *Trevett v. Lee* [1955] 1 W.L.R. 113, at 117, by Evershed M.R.

³² The Highways Act, 1959, ss. 117–150, creates numerous criminal offences in relation to the obstruction of or damage to highways.

³³ *The Carlgarth* [1927] P. 98, at 102, *per* Bankes L.J.

³⁴ Above, § 25.

³⁵ *Harper v. Haden & Sons* [1933] Ch. 298. See also *Black v. Mitchell* [1951] N.I. 145 (projecting sunblind).

and carts,³⁶ or motor-vehicles,³⁷ standing in it for an unreasonable time or in unreasonable number; collecting a crowd of people in it, as at a theatre door or a public meeting³⁸; making excavations or erections in it without lawful authority.

(2) Dangers to highway

This may be caused either by something done in the highway itself or by something done on the land which adjoins it. It is now clear that the fact that a vehicle has broken down on the highway in the dark and its lights have gone out without any negligence on the part of the driver does not constitute a nuisance immediately and automatically: the driver may, however, be liable if he allows the unlighted vehicle to obstruct the highway without taking reasonable steps to light it or remove it or give warning of its existence,³⁹ for "Any unlighted obstacle on a fast motor-road is a danger to traffic. That is a proposition, not of law, but of common sense."⁴⁰ Other examples are keeping in the highway defective and dangerous tramway-lines, coal-plates, or cellar gratings⁴¹; leaving on the highway or adjacent thereto matter on which passengers are likely to slip⁴²; allowing a house, fence, or other structure immediately adjoining the highway to become ruinous and dangerous⁴³; keeping unfenced an excavation so close to the highway as to be a

³⁶ *Benjamin v. Storr* (1874) L.R. 9 C.P. 400; *Fritz v. Hobson* (1880) 14 Ch.D. 542.

³⁷ *Chesterfield Corporation v. Arthur Robinson (Transport), Ltd.* (1955) 106 L.J.(News.) 61 is a good modern example. A main road was obstructed for 76 hours as a result of the defendants' negligent mode of conveying an outsize load of 83 tons. The plaintiffs recovered for the special damage which they had suffered through the diversion of their omnibus service.

³⁸ *Barber v. Penley* [1898] 2 Ch. 447 (crowds at *Charley's Aunt*); *Lyons, Sons & Co. v. Gulliver* [1914] 1 Ch. 631; *Dwyer v. Mansfield* [1946] K.B. 487.

³⁹ *Maitland v. Raisbeck* [1944] K.B. 689, explaining *Ware v. Garston Haulage Co.* [1944] K.B. 80. For failure to light or guard obstructions erected in the highway under statutory powers, see above, § 16.

⁴⁰ *Hill-Venning v. Bessant* [1950] 2 All E.R. 1151, at 1153, per Denning L.J.

⁴¹ *Pretty v. Bickmore* (1873) L.R. 8 C.P. 401. *Aliter* with structures which are really part of the highway and are therefore to be repaired by the local authority and not by the adjoining occupiers: *Robbins v. Jones* (1863) 15 C.B.(N.S.) 221. But there may be liability under the Public Health Acts Amendment Act, 1890, s. 85: *Macfarlane v. Gwalter* [1959] 2 Q.B. 832; *Ison*, 21 M.L.R. 304.

⁴² *McGowan v. Masterson* (1952) 87 L.L.T.R. 102.

⁴³ *Harrold v. Watney* [1898] 2 Q.B. 820. Contrast *Morton v. Wheeler, The Times*, February 1, 1956 (spikes on shop window not a nuisance).

danger in case of accidental deviation⁴⁴; keeping at a golf-club a hole where players are in the habit of slicing on to the highway.⁴⁵ The plaintiff's property need not be immediately contiguous to the highway: it is enough if it is sufficiently proximate to the highway to be affected by the misuse of it.⁴⁶

Existing dangers

When, however, a road is dedicated to the public, it is presumed to be so dedicated on the terms that the public right of passage is to be subject to all obstructions and dangers which exist at the time of dedication; and the adjoining owners and occupiers are therefore under no liability for maintaining such obstructions or dangers or for any mischief that may result from them.⁴⁷ Nor are they liable for a mere passive failure to prevent new dangers from arising on the highway or to give warning of their existence. *A fortiori* when something has been done on the highway itself which makes it dangerous there is no obligation on the occupier of the adjoining land to do away with the danger. Were it otherwise, an intolerable burden would be put upon the occupiers of land adjoining highways.⁴⁸ In these respects the public must look after itself.

What is an obstruction or danger?

It must be realised that it is not every act which constitutes an obstruction of or a danger to the highway which constitutes a public nuisance. The law has to hold an even balance between the conflicting claims of those who have an interest in the use of the highway. Thus, on the one hand, it has been settled ever since the time of Lord Blackburn that "Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near to it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking on themselves the risk of injury from that

⁴⁴ *Jacobs v. L.C.C.* [1950] A.C. 361.

⁴⁵ *Castle v. St. Augustine's Links* (1922) 38 T.L.R. 615.

⁴⁶ *Southport Corporation v. Esso Petroleum Co. Ltd.* [1953] 3 W.L.R. 773, 776; [1956] A.C. 218, 225.

⁴⁷ *Fisher v. Prowse* (1862) 2 B. & S. 770.

⁴⁸ *Nicholson v. Southern Ry.* [1935] 1 K.B. 558.

inevitable danger.”⁴⁹ Hence although a permanent obstruction erected in a highway without lawful authority necessarily constitutes a public nuisance, as it in fact operates as a withdrawal of part of the highway from the public, a temporary obstruction may be permissible if it is negligible in point of time or authorised by Parliament or occasioned in the reasonable and lawful user of the highway as a highway.⁵⁰ “The law relating to the user of highways is in truth the law of give and take. Those who use them must in doing so have reasonable regard to the convenience and comfort of others, and must not themselves expect a degree of convenience and comfort only obtainable by disregarding that of other people. They must expect to be obstructed occasionally. It is the price they pay for the privilege of obstructing others.”⁵¹ Thus a person has a right to obstruct a highway by the erection of scaffolding and hoardings for the purpose of repairing his house,⁵² so long as the inconvenience to the public is necessarily so caused and does not offend either in *quantum* or duration; or he may temporarily obstruct the highway by causing his motor-car to stop outside his house for the purpose of discharging passengers or goods going into the house.⁵³ On the other hand, we shall see that any person who procures or authorises the doing in any highway of any dangerous act other than the use of the highway for ordinary purposes of passage (for example, by making an excavation in it) has imposed upon him a duty of care so strict that it cannot be discharged by the employment of an independent contractor.⁵⁴

SPECIAL DAMAGE

A nuisance to a highway amounts to a misdemeanour and may be made the subject of an indictment at common law. It

⁴⁹ *Fletcher v. Rylands* (1866) L.R. 1 Ex. 265, at 286. See the same learned judge in *River Wear Commissioners v. Adamson* (1877) 2 App.Cas. 743, 767. For other illustrations of this principle, see above, § 12, and below, § 52.

⁵⁰ This sentence was cited with approval by Pilcher J. in *Buck v. Briggs Motor Bodies Ltd.* (1959) *The Times*, April 18 (gate across pavement).

⁵¹ *Harper v. Haden (G. N.) & Sons Ltd.* [1933] Ch. 298, at 316-317, 320. per Romer L.J.

⁵² *Harper v. Haden (G. N.) & Sons Ltd.* [1933] Ch. 298 (in fact in this case the scaffolding was erected for the purpose of adding another storey); *Almeroth v. Chivers, Ltd.* [1948] 1 All E.R. 53 is on the other side of the line.

⁵³ *Trevett v. Lee* [1955] 1 W.L.R. 118, 118.

⁵⁴ Below, § 202.

may also be restrained by injunction at the suit of the Attorney-General acting *ex officio* or at the relation of a local authority or any private person interested in the matter. But it is not *per se* actionable at the suit of a private person—a rule established for the purpose of preventing oppression by means of a multiplicity of civil actions for the same cause. No such action will lie save at the suit of a person who can show special and particular damage suffered by himself and distinct from the general inconvenience endured by him in common with the public at large.⁵⁵ The particular damage for which an individual or corporation can sue in his own name is not limited to special damage in the sense of actual pecuniary loss, but may consist of proved general damage—*e.g.*, inconvenience and delay, provided that it is substantial, direct, and appreciably greater in degree than any suffered by the general public.⁵⁶ The damage must be of a substantial character, not fleeting or evanescent.⁵⁷

Nature of special damage

The special or particular damage which must be proved includes injury to the plaintiff's person, chattels, depreciation of actual value of property and loss of custom.⁵⁸

(1) Injury to person

In *Castle v. St. Augustine's Links* ⁵⁹ a taxicab driver who lost his eye from a sliced golf-ball recovered damages from the golf-club whose hole was so near the highway as to be a public nuisance.

(2) Injury to chattels

When oily smuts from the defendant's refinery damaged both the clothes drying in his garden and the paintwork of his car parked in the road outside, the plaintiff recovered for the former in private nuisance but for the latter in public nuisance.⁶⁰

⁵⁵ *Winterbottom v. Derby (Lord)* (1867) L.R. 2 Ex. 316, 320, 322.

⁵⁶ *Walsh v. Ervin* [1952] V.L.R. 361.

⁵⁷ *Vanderpant v. Mayfair Hotel Co.* [1930] 1 Ch. 138, 153; *Harper v. Haden & Sons* [1933] Ch. 304, 308.

⁵⁸ *Walsh v. Ervin* [1952] V.L.R. 361, 368.

⁵⁹ (1922) 38 T.L.R. 615.

⁶⁰ *Halsey v. Esso Petroleum Co. Ltd.* [1961] 1 W.L.R. 683.

(3) Injury to pecuniary interests

This may occur when the plaintiff has incurred expense or suffered pecuniary loss by being prevented from using the highway. Thus in *Rose v. Miles*⁶¹ the plaintiff, who complained of the obstruction of a navigable canal, was held to have a good cause of action on proving that he had been compelled to unload his goods from barges and carry them overland, thereby incurring additional expense. So in *Campbell v. Corporation of Paddington*⁶² the occupier of premises abutting on a highway was held to have a good cause of action for the wrongful erection in the highway of a stand which obstructed the view of the highway from her windows and so prevented her from making profitable contracts for the use of her premises for viewing Edward VII's funeral procession. In *Wilkes v. Hungerford Market Co.*⁶³ it was held that an action will lie even if the only special damage proved is an injury to the plaintiff's business, due to the fact that the obstruction to the highway has hindered the public from resorting to his business premises. In other words, it is said that the special damage may be suffered by the plaintiff not because he has been prevented from using the highway as beneficially as heretofore, but merely because other persons have been so hindered, so that the result of their hindrance is a loss suffered by himself. Some dicta in the House of Lords in *Ricket v. Metropolitan Ry.*⁶⁴ cast some doubt on this decision, but the better view seems to be that *Wilkes'* case is still good law, and that *Ricket's* case is merely a decision that the damage in that case brought under the Lands Clauses Act and the Railways Clauses Act was too remote to be recovered as damage to property.⁶⁵ It is submitted therefore that damage done to the plaintiff in his trade by the illegal obstruction of a highway is an actionable wrong.⁶⁶

⁶¹ (1815) 4 M. & S. 101.

⁶² [1911] 1 K.B. 869.

⁶³ (1895) 2 Bing.N.C. 281.

⁶⁴ (1887) L.R. 2 H.L. 175, 188, 199.

⁶⁵ *Blundy, Clark & Co. v. L. & N. E. Ry.* [1931] 2 K.B. 334; *Harper v. Haden & Sons* [1933] Ch. 298.

⁶⁶ See also *Fritz v. Hobson* (1880) 14 Ch.D. 542; *Smith v. Wilson* [1903] 2 I.R. 45. This particular point was not taken in *Lyons, Sons & Co. v. Gulliver* [1914] 1 Ch. 631 (theatre queue obstructing access).

Criticism

These principles are as old as any in the common law⁶⁷ and can now be altered only by legislation.⁶⁸ Yet it is not easy to see their justification in logic if the action of nuisance be confined (as it is generally affirmed to be) to cases of interference with the enjoyment of land or rights over land. One cause of the difficulty is a confusion between A's right of way over B's land (a private right for interference with which nuisance rightly lies) and A's right as one of the Queen's subjects to pass along her highway (a public right).⁶⁹ In theory the proper remedies for personal injuries caused by such obstructions of the highway as amount to a public nuisance should be the actions of trespass and negligence.⁷⁰

Plaintiff off highway

The special damage required to support an action must have been suffered as a result of the use of the highway.⁷¹ Thus in *Jacobs v. L. C. C.*⁷² the plaintiff, in order to reach a shop, stepped from the highway on to a paved forecourt separating the shop from the public pavement, and tripped over a stopcock about two feet from the boundary line which protruded about an inch and a quarter above the surrounding paving stones. It was held that (even assuming that a stopcock protruding by so little was capable of being a nuisance) the plaintiff had not suffered injury while using the highway and was without remedy.⁷³ Lord Simonds said that the "House was referred to no case and my researches have led me to none where a plaintiff has deliberately left the highway to go elsewhere, and having left it and having suffered injury upon the adjoining land, has then been held entitled to recover upon a claim of public nuisance in respect

⁶⁷ *Hardcastle v. South Yorkshire Ry.* (1859) 4 H. & N. 67.

⁶⁸ *Mumford v. Naylor* [1951] 1 T.L.R. 1068, 1070 (reversed on another point in [1951] W.N. 579). Although the law on the matter is commonly traced back to a dictum of Fitzherbert J. in 1536 (Y.B. 27 Hen. VIII, Mich., pl. 10), there was a divergence of opinion even before that date: *Walsh v. Ervin* [1952] V.L.R. 361, 367.

⁶⁹ *Mumford v. Naylor* [1951] 1 T.L.R. 1068, 1070.

⁷⁰ See Newark, "The Boundaries of Nuisance" (1949) 65 L.Q.R. 480.

⁷¹ This sentence was cited with approval by Ormerod L.J. in *Schrader v. Crossville Motor Services Ltd.* (unreported), 1959 C.A. 10.

⁷² [1950] A.C. 361.

⁷³ A claim founded on the duty owed by an occupier of dangerous premises to those who enter on them also failed: see below, § 109.

of which he suffered special damage. Far as the law of nuisance has travelled beyond its original limits, this further extension appears to me to be justified neither by reason nor by authority.”⁷⁴ So also if a person climbs upon a stationary vehicle, which is left upon the highway, to see a cricket match and falls off and injures himself, it is not relevant for him to complain that the van was an obstruction to the highway and a nuisance. The accident does not happen because the vehicle is an obstruction to the highway, but because the plaintiff has trespassed upon it.⁷⁵ A mere temporary departure from the boundaries of the highway will not always, however, disentitle the plaintiff to recover. He may still be regarded as a user of the highway if he has diverged from it accidentally⁷⁶ or by reason of necessity.⁷⁷

§ 32. Liability for the Non-Repair of Roads⁷⁸

(1) The common law

The law governing the liability of highway authorities towards individual members of the public exercising the common right of passage over the highway has no similarity or even analogy to the duties of occupiers of property to those permitted or invited to enter the premises.⁷⁹ At common law no action lay against any authority entrusted with the care of highways for damage suffered in consequence of the omission of the defendants to perform their statutory duty of keeping the highway in repair. This exemption extended only to cases of pure non-feasance, and the public authority was responsible for any active misfeasance by which the highway was rendered dangerous. At common law the duty of repairing highways rested upon the inhabitants of the parish and was enforceable by way of indictment only, and not by way of action at the suit of an individual, even though he had suffered special damage.⁸⁰

⁷⁴ [1950] A.C. 361, at 377.

⁷⁵ *Donovan v. Union Cartage Co.* [1938] 2 K.B. 71, 78; *Liddle v. Yorkshire C. C.* [1934] 2 K.B. 101.

⁷⁶ *Barnes v. Ward* (1850) 9 C.B. 392.

⁷⁷ See above, § 11.

⁷⁸ See Holdsworth, H.E.L., x, pp. 314–319; Denning, 55 L.Q.R. 343; Sawyer, “Non-Feasance Revisited” (1955) 18 M.L.R. 541.

⁷⁹ *Buckle v. Bayswater Road Board* (1936) 57 C.L.R. 259, 280.

⁸⁰ *Russell v. Men of Devon* (1788) 2 T.R. 667.

Finally, when the care of highways was transferred by statute to corporate local authorities the same rule of exemption was applied to them.⁸¹ The duty of repair, in being thus transferred from the inhabitants at large to a body corporate, has not changed its nature nor does the breach of it now, any more than formerly, confer any right of action upon injured individuals.⁸²

Exceptions

(i) *Only highway authorities protected*

This unsatisfactory exemption from liability, which will not be extended,⁸³ did not extend to every person or body upon whom liability to repair a road was thrown. It extends only to those who "are really the successors of and have really had transferred to them the duties and liabilities which originally rested on the inhabitants."⁸⁴ It did not afford protection to dock companies,⁸⁵ railway companies,⁸⁶ or canal companies⁸⁷ taking tolls. Again, where a local authority, which happened to be a highway authority, was guilty of non-feasance in respect of something which it did in the highway in some other capacity, e.g., as sanitary authority, it was liable for that non-feasance.⁸⁸ It was uncertain whether the exemption covered contractors to a highway authority. On the one hand, it was said that they do not become a highway authority because they act under a contract with a highway authority.⁸⁹ On the other hand, it was held that there was no reason to make an exception from the general rule that an agent carrying out functions of a public nature is entitled to the same immunities as his principal.⁹⁰

⁸¹ This passage was cited with approval by Humphreys J. in *Swain v. Southern Ry.* [1939] 1 K.B. 77, 83. Hence the reason for the rule cannot be the fact that the bodies on whom the duty of repair lay were not corporations, as was said in *Russell v. Men of Devon*. None of the various reasons advanced during the long history of the rule seems adequate.

⁸² *Municipality of Pictou v. Geldert* [1898] A.C. 524.

⁸³ *Att.-Gen. v. St. Ives R. D. C.* [1960] 1 Q.B. 312, 323.

⁸⁴ *Swain v. Southern Ry.* [1939] 2 K.B. 560, at 574, per Humphreys J.

⁸⁵ *Guilfoyle v. Port of London Authority* [1932] 1 K.B. 396.

⁸⁶ *Swain v. Southern Ry.* [1939] 2 K.B. 560.

⁸⁷ *Parnaby v. Lancaster Canal Co.* (1839) 11 A. & E. 230.

⁸⁸ *White v. Hindley Local Board* (1875) L.R. 10 Q.B. 219.

⁸⁹ *Drake v. Bedfordshire C. C.* [1944] K.B. 620, 626.

⁹⁰ *Quinn v. Ministry of Commerce* [1954] N.I. 131.

(ii) *Liability for act of misfeasance making road dangerous*

This exemption applied only to cases of mere passive non-feasance—mere omission to repair. It did not extend to an active misfeasance—a positive act by which a danger is wrongfully caused in the highway and by which the plaintiff has come to harm, *e.g.*, by making an excavation in the road⁹¹ or by raising it improperly.⁹² It was a misfeasance to erect or place in the highway any artificial structure which is not itself part of the highway and then to allow that structure, as opposed to the highway itself, to fall into a dangerous state of disrepair.⁹³ If, however, the danger was caused not by any defect in the artificial structure itself but solely by the wearing away or disrepair of the highway, whereby the structure was rendered a source of danger, there was no liability at all: none in respect of the artificial structure, for it was not defective; and none in respect of the road, for the case was merely one of non-feasance.⁹⁴

(2) *The Highways (Miscellaneous Provisions) Act, 1961*

“My Lords, I never thought when, at Oxford many years ago, I first learned about the non-feasance rule, that it would fall to my lot nearly a generation later to move a Bill which would have the effect of bringing to an end what I think has generally been regarded as an anomaly which has resulted in injustice to many people.”⁹⁵ In these words Lord Molson⁹⁶ introduced a Bill which amended the law on this point in consequence of many criticisms.⁹⁷ The Act came into force on August 8, 1964. Section 1 (1) of the Act, which binds the Crown,⁹⁸ abrogates “the rule of law exempting the inhabitants at large and any other persons as their successors from liability for non-repair of highways.”

⁹¹ *Newsome v. Darton U. D. C.* [1938] 3 All E.R. 93.

⁹² *Att.-Gen. v. Todmorden B. C.* [1937] 4 All E.R. 588, 595–596.

⁹³ For a collection of the cases on the distinction between misfeasance and non-feasance, see Robinson, *Public Authorities*, pp. 183–197. The distinction is clearly a fine one and has been said to be limited to this branch of the law: *Pride of Derby, etc. Ltd. v. British Celanese* [1953] Ch. 159, 176, 188.

⁹⁴ *Thompson v. Mayor of Brighton* [1894] 1 Q.B. 332.

⁹⁵ 232 H.L. Deb. col. 1423 (July 5, 1961).

⁹⁶ Lancing and New College; First Class in Honour School of Jurisprudence 1925.

⁹⁷ Notably from the General Council of the Bar, which in 1960 reported in favour of a change in the law.

⁹⁸ s. 1 (5). This is important, as an increasing number of roads are being vested in the Crown in right of the Minister of Transport.

But section 1 (2) provides that in an action against a public authority for damage resulting from their failure to maintain a highway it shall be a defence to prove that the authority has taken such care as is reasonable in the circumstances to secure that the part of the highway to which the action relates was not dangerous for traffic. The Act (section 1 (8)) specifically provides that in assessing what is reasonable the court shall have regard to such factors as the character of the highway and the traffic which might reasonably be expected to use it. But the negligence of a contractor is not necessarily a defence.⁹⁹

⁹⁹ See below, § 202.

CHAPTER 6

INTERFERENCE WITH INTERESTS IN CHATTELS

§ 33. Introductory ¹

WE are now about to consider the extent to which the law protects proprietary interests in chattels. "In the development of our law, two principles have struggled for mastery. The first is the protection of property. No one can give a better title than he himself possesses. The second is the protection of commercial transactions. The person who takes in good faith and for value without notice should get a good title."² In the course of centuries both common law and statute have created exceptions to the principle that no one can give a better title than he himself has.

The common law has always recognised that the title of the true owner may be divested in favour of a bona fide purchaser for value in two cases. "One depends upon a peculiarity in the . . . property itself; the other upon a peculiarity in the place where the purchaser buys it."³ Parliament has also given further protection to the security of commercial transactions by the Factors Act, 1889, the Sale of Goods Act, 1893,⁴ and the Hire-Purchase Act, 1964. Section 27 of the 1964 Act has effected a considerable change in the law by providing that, where a hirer of a motor-vehicle under a hire-purchase agreement wrongfully disposes of that vehicle to a bona fide purchaser for value who has no notice of the agreement, then a good title to the vehicle is passed, although the hirer may still be liable to the finance

¹ Kiralfy, "The Problem of a Law of Property in Goods" (1949) 12 M.L.R. 424; Prosser, "The Nature of Conversion" (1957) 42 Cornell L.Q. 168.

² *Bishopsgate Motor Finance Corporation v. Transport Brakes, Ltd.* [1949] 1 K.B. 322, at 336-337, per Denning L.J.

³ Kenny's *Outlines of Criminal Law*, p. 317. The references are, of course, to money or negotiable instruments and sales in market overt.

⁴ For details consult *Benjamin on Sale*, 8th ed., 1950. To avoid misconception, it may be noted that the mere fact that the owner has thus been compulsorily divested of his property does not mean that he must bear the loss. A takes B's goods and sells them to C in market overt: C gets a good title but A is liable to B for the value of the goods.

company. Further, the tendency of the courts is to magnify the protection which those Acts give to purchasers at the expense of the true owner. The Factors Act, 1889, s. 2 (1), provides that if a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any sale, pledge or other disposition made by him when acting in the ordinary course of business of a mercantile agent, shall be effective to pass a good title to a bona fide purchaser for value. It is well settled that consent obtained by fraud is still consent for the purposes of this section,⁵ so that when a rogue obtains possession of a motor-car by false pretences and sells it for cash in the Warren Street used-car market the purchaser gets a good title.⁶

Some have denied or doubted the existence of a law of property in chattels on the ground that our law recognises no real or proprietary action for the recovery of chattels corresponding to the *vindicatio* of Roman law.⁷ But, "as modern experience shows, a very true and intense ownership of goods can be pretty well protected by actions in which nothing but money can with any certainty be obtained."⁸ The value of the thing is obtained because the plaintiff shows that it belongs to him. It seems irrelevant that an historical accident denies him recovery *in specie*. Indeed there is reason to believe that in some respects the common law is more favourable to the owner of goods than systems founded on the civil law.⁹ For the action of trover or conversion, which is our normal remedy for one deprived of his goods, has features characteristic of both property and tort.¹⁰ In so far as it is a *vindicatio* there is no room for inquiry as to the defendant's state of mind: liability in conversion is strict. In so far as it is an action in tort it lies against anyone who has

⁵ *Du Jardin v. Beadman Bros.* [1952] 2 Q.B. 712.

⁶ *Newtons of Wembley Ltd. v. Williams* [1964] 1 W.L.R. 1028.

⁷ This has been a commonplace since the time of Bracton, although after the Common Law Procedure Act, 1854, the courts have had a discretionary power to order the specific restitution of chattels. This statute has removed the original reason for which we call lands "real" and chattels "personal" property; but the terms were adopted long ago and are likely to endure: Maitland, *The Forms of Action at Common Law*, p. 365. For the power to order the plaintiff to accept restitution instead of damages, see below, § 44.

⁸ P. & M. ii, 181-182.

⁹ See Lawson, *The Rational Strength of English Law*, pp. 125-131.

¹⁰ This has made for difficulty in the search for the basis of liability in tort: above, § 4.

at any time committed an act which constitutes a denial of the plaintiff's title. "Where there have been successive conversions of the same goods, trover lies against all persons guilty of conversion and recovery of damages against one is no answer by the defendants in subsequent actions, though . . . as soon as full satisfaction has been obtained the plaintiff has exhausted his rights."¹¹

We can now consider the details of the four actions which protect property interests in chattels: trespass, conversion, detinue, and replevin.

§ 34. Trespass to Chattels

The tort of trespass to chattels consists in committing without lawful justification any act of direct physical interference with a chattel in the possession of another person—that is to say, it is such an act done with respect to a chattel as amounts to a direct forcible injury within the meaning of the distinction drawn in the old practice between the writ of trespass and that of trespass on the case.¹² The tort may be committed against an animal,¹³ e.g., it is a trespass to beat a dog,¹⁴ or to shoot racing pigeons.¹⁵ Thus it is a trespass to take away a chattel or to do wilful damage to it. Even negligent damage, if direct and not merely consequential, falls within the scope of trespass: as in the case of a negligent collision between two vehicles.¹⁶ Physical interference usually consists in some form of physical contact—some application of force by which the chattel is moved from its place or otherwise affected. So in *Kirk v. Gregory*¹⁷ the plaintiff was the executor of one who

¹¹ *Morris (B. O.), Ltd. v. Perrott* [1945] 1 All E.R. 567, at 569, per Lord Goddard. This is not to say that there may not be claims for contribution or indemnity between the defendants, but the primary concern of the law is to compensate the plaintiff for his loss: he is entitled to sue that person in the chain of converters who seems the most likely to be able to pay, leaving him to collect what he can from anybody else in the chain.

¹² Above, § 2.

¹³ Or by an animal, e.g., if I train (or perhaps knowingly permit) my dog to fetch another's golf balls: *Manton v. Brocklebank* [1923] 2 K.B. 212, 229.

¹⁴ *Wright v. Ramscot* (1665) 1 Wms.Saund. 183. It is a trespass for a veterinary surgeon to extract the teeth of a show-dog without the owner's permission: see the unreported case cited in Gray, *Civil Injuries*, p. 57.

¹⁵ *Hamps v. Darby* [1948] 2 K.B. 311.

¹⁶ *Leame v. Bray* (1803) 3 East 598.

¹⁷ (1876) 1 Ex.Div. 55.

had died in his own house in a state of delirium tremens. The defendant, alarmed by the fact that the servants and others were feasting and drinking in the house, moved certain rings from one room to another, in the mistaken but genuine belief that it was necessary to do so. The defendant was held liable in trespass^{17a} for the loss of the rings. But it is also presumably a trespass wilfully to frighten a horse so that it runs away, or to drive cattle out of a field in which they lawfully are,¹⁸ or to kill a dog by giving it poisoned meat.

Trespass actionable *per se*

A trespass to chattels is actionable *per se* without any proof of actual damage.¹⁹ Any unauthorised touching²⁰ or moving of a chattel is actionable at the suit of the possessor of it, even though no harm ensues. It may be very necessary for the protection of certain kinds of property, *e.g.*, museum specimens, that this should be the law.²¹ Hence the successful plaintiff will always be entitled to nominal damages at least.²² Further, in the older common law it was generally assumed that it was unnecessary for the plaintiff in an action of trespass to chattels to prove intention or negligence in the defendant. But the present position is very doubtful in view of the fact that it now seems settled that in an action of trespass for personal injuries the plaintiff must prove intention or negligence.²³ In any event the general principle has been much weakened by two exceptions.

(1) Highway accidents

A person whose property on or adjoining the highway (*e.g.*, a motor-car or house) has been damaged accidentally as the result of the activities of a user of the highway can recover only if he establishes negligence. This rule has been established more by the dicta of eminent judges and the common understanding

^{17a} Nominal damages of one shilling were awarded.

¹⁸ *R. v. Riley* (1858) 22 L.J.M.C. 48.

¹⁹ *Leitch & Co. v. Leydon* [1931] A.C. 90, 106; *Penfolds Wines Pty. Ltd. v. Elliott* (1946) 74 C.L.R. 204, 214-215.

²⁰ "Scratching the panel of a carriage would be a trespass": *Fouldes v. Willoughby* (1841) 8 M. & W. 540, at 549, *per* Alderson B. *Everitt v. Martin* [1958] N.Z.L.R. 298 suggests that a merely accidental contact without any damage or asportation is not actionable: *sed quare*.

²¹ See Pollock, *Torts*, p. 265. *Contra*, Street, *Foundations*, I, p. 16.

²² *Kirk v. Gregory* (1876) 1 Ex.D. 55.

²³ See below, § 52.

of the profession than by any particular decision,²⁴ but its authority appears now to be beyond question.²⁵

(2) *Inevitable accident*

In *National Coal Board v. Evans*²⁶ the Court of Appeal held that inevitable accident was a good defence to an action for trespass to chattels. The plaintiffs' predecessors in title laid an electric cable under the land of a county council without informing it or the defendant contractors, whom it employed to conduct the excavation in the course of which the cable was damaged. It was held that since the accident was mainly attributable to the act of the plaintiffs in wrongfully placing their cable in another's land the defendants were excused as being utterly without fault.

The title of the plaintiff

Trespass to chattels, like trespass to land, is essentially an injury to possession and not to ownership. The plaintiff, therefore, in an action of trespass must have been in actual possession at the time of the interference complained of.²⁷ To this there are four exceptions:

(1) A trustee out of possession can bring trespass against third parties on the strength of his right to immediate possession.²⁸

(2) An executor or administrator may sue for a trespass committed to the goods of the deceased after his death but before the grant of probate or letters of administration²⁹; his title relates back to the time when the trespass was committed.

(8) The owner of a franchise which entitles him to goods can bring trespass in respect of interference with the goods before he has actually seized them.³⁰

²⁴ *Holmes v. Mather* (1875) L.R. 10 Ex. 261, 267 (Bramwell L.J.); *River Wear Commissioners v. Adamson* (1877) L.R. 2 App.Cas. 743, 767 (Lord Blackburn); *Gayler and Pope v. B. Davies & Son* [1924] 2 K.B. 75. See Winfield and Goodhart, "Trespass and Negligence" (1933) 49 L.Q.R. 49.

²⁵ See also above, § 12.

²⁶ [1951] 2 K.B. 861.

²⁷ *Ward v. Macauley* (1791) 4 T.R. 489.

²⁸ *White v. Morris* (1852) 11 C.B. 1015; *Barker v. Furlong* [1891] 2 Ch. 172.

²⁹ *Tharpe v. Stallwood* (1843) 5 M. & G. 760.

³⁰ *Bailiffs of Dunwich v. Sterry* (1831) 1 B. & Ad. 831. Some writers, amongst whom was Salmond, have inferred from these cases that a right to possession always carries the right to bring trespass, but this is inconsistent with the statutory origin of the crimes of receiving stolen goods and

(4) In the case of a bailment at will the bailor does not lose his possession any more than the master does when his chattels are in the custody of his servant; both bailor at will and master can bring trespass against a third person but not against the bailee or servant.³¹

The *jus tertii* can only be successfully pleaded where the defendant acted under it. Even a wrongdoer with possession can bring trespass against a person without title,³² but not against the owner of the goods or anyone acting under his authority.³³

§ 35. History of the Action of Trover³⁴

The wrong of conversion is so dependent for a due understanding of its true nature upon a knowledge of its origin and historical development that before attempting any systematic exposition of the present law it is necessary to give an outline of the mode in which it has come into existence. There are three distinct methods by which one man may deprive another of his property, and so be guilty of a conversion and liable in an action of trover—(1) by wrongly taking it, (2) by wrongly detaining it, and (3) by wrongly disposing of it.³⁵ In the first case the wrongdoer acquires a possession which is wrongful *ab initio*. In the second he acquires possession rightfully but retains it wrongfully. In the third case he neither takes it wrongfully nor detains it, but so acts that it is lost to the true owner. The term conversion was originally limited to the third of these cases. To convert goods meant to dispose of them, to make away with them, to deal with them, in such a

embezzlement, and with *R. v. Clinton* (1869) 4 Ir.R.C.L. 6. See P. & W., *Possession*, pp. 145–147 (adopted by Dixon J. in *Penfolds Wines Pty., Ltd. v. Elliott* (1946) 74 C.L.R. 204, 226–227); Holdsworth, H.E.L., vii, pp. 422–424.

³¹ *Lotan v. Cross* (1810) 2 Camp. 464; *White v. Morris* (1852) 11 C.B. 1015, 1028, 1030; *Penfolds Wines Case* (1946) 74 C.L.R. 204, 214–217, 226–228. Cf. *Attersoll v. Stevens* (1808) 1 Taunt. 190; *U.S.A. v. Dollfus Mieg* [1952] A.C. 532.

³² *Woodson v. Newton* (1727) 2 Str. 777.

³³ *Blades v. Higgs* (1865) 20 C.B.(n.s.) 214.

³⁴ Holdsworth, H.E.L., vii, pp. 402–447; Fifoot, *History and Sources*, Chap. 6; Milsom, "Not Doing is no Trespass" [1954] C.L.J. 105; Simpson, "The Introduction of the Action on the Case for Conversion" (1959) 75 L.Q.R. 364.

³⁵ This sentence was cited by Williams J. in *Penfolds Wines Pty. Ltd. v. Elliott* (1946) 74 C.L.R. 204, at 240.

way that neither owner nor wrongdoer had any further possession of them: for example, by consuming them, or by destroying them, or by selling them, or otherwise delivering them to some third person. Merely to take another's goods, however wrongfully, was not to convert them. Merely to detain them in defiance of the owner's title was not to convert them. An article was converted to the use of the thief when it was used by him; food, when it was eaten, jewels, when they were pawned or sold. The fact that conversion in its modern sense includes instances of all three modes in which a man may be wrongfully deprived of his goods, and not of one mode only, is the outcome of a process of historical development whereby, by means of legal fictions and other devices, the action of trover was enabled to extend its limits and appropriate the territories that rightly belonged to other and earlier forms of action. Corresponding to these three modes of wrongful deprivation there were three distinct forms of action provided by the law—(1) trespass *de bonis asportatis*, for wrongful taking; (2) detinue, for wrongful detention; and (3) trover, for wrongful conversion (that is to say, disposal). Of these three actions trover is the most recent in origin.

The declaration in trover was simply a variant of the declaration in detinue, the only material difference being that in trover the defendant was charged with wrongly converting the property to his own use, while in detinue he was charged with unjustly detaining it. Detinue was of two kinds, distinguished as detinue *sur bailment* and detinue *sur trover*. The former was the appropriate remedy when the property had come to the defendant's hands by a bailment or contract between the parties. The latter, or detinue *sur trover*—which is not to be confounded with the action of trover itself—was appropriate when the defendant had found the goods, or indeed had come by them in any other fashion save by contract with their owner. These allegations of bailment or finding were, however, immaterial and untraversable. Usually it mattered nothing in what manner the defendant had obtained possession of the property. Indeed, the older mode of pleading was to make no allegation in the matter, save that the goods of the plaintiff had come to the defendant's hands (*devenerunt ad manus*) and were unjustly

detained by him. In 1455³⁶ we find an action of *detinue sur trover* in which the specific allegation of finding (declaration *per inventionem*) is criticised by Littleton as a novelty—"a new-found Haliday." The only issues were whether the goods were the property of the plaintiff, and whether the defendant unjustly detained them. The action of trover and conversion was modelled upon that of *detinue sur trover*. The plaintiff alleged in his declaration (1) that he was possessed of certain goods *ut de bonis propriis*; (2) that he casually lost them, and that the defendant found them; and (3) that the defendant did not restore them, but wrongfully converted them to his own use. As in *detinue*, so in *trover*, this second allegation as to losing and finding was in most cases a mere fiction; in any case it was immaterial and untraversable. Nor was it ever essential. The plaintiff might have alleged a bailment instead of a loss and finding, thus modelling his declaration on *detinue sur bailment* instead of on *detinue sur trover*. Or a general allegation of *devenerunt ad manus defendantis* would have been good enough. It must not be supposed that the action of trover was specially or originally designed to meet the case of an actual loss and finding. The allegation of loss and finding was from the beginning merely a form of pleading imitated from the action of *detinue*. No sooner, however, has trover become thus established than it begins to extend its boundaries, and it very rapidly succeeds in appropriating almost the whole territory both of trespass and of *detinue*. In most cases of wrongful taking the plaintiff might elect between trespass and trover, and in most cases of detention he might elect between *detinue* and trover.

Negligent loss of chattels not conversion

Notwithstanding this extension of the original scope of trover, there remains one respect in which the action of *detinue* is of wider application. *Detinue* is available not only when there is a real detention of a chattel (*i.e.*, a refusal to deliver it, while it still remains in the possession or control of the defendant), but also where the defendant is unable by his own fault to make delivery, whether this fault consists in a wilful act of wrongful

³⁶ Y.B. 38 Hen. VI, f. 27, pl. 12.

disposition or in mere negligence leading to the loss or destruction of the chattel. Thus a bailee who negligently allows the goods to be stolen from him or to be destroyed while in his possession can be sued in detinue as for the detention of them, despite the fact that he is not in actual possession at the time of the demand.³⁷ He may also be liable in negligence³⁸ or on his contract. But he cannot be sued in trover, for there is no conversion unless he has wilfully disposed of the property (as by delivering it to another person) or unless he has refused to deliver it on request while he still has it in his possession.³⁹

Conversion by taking: trover and trespass

We now have seen how the new remedy of trover was extended to cover the ground of detinue and it remains to notice the process by which it became almost concurrent with trespass *de bonis asportatis* also. The allegations of loss and finding being immaterial and untraversable, it mattered nothing in what way the property came to the defendant's hands. Whether it was by bailment, or by finding, or by tortious taking, was irrelevant, if an actual or constructive conversion could be proved. Therefore when goods were taken and converted the plaintiff had an election either to sue in trespass for the taking, or, waiving the trespass, to sue in trover for the conversion. This was settled, not indeed without difficulty, in *Bishop v. Viscountess Montagu*.⁴⁰ There soon developed a strong current of dicta to the effect that trover would lie in all cases of an unlawful taking. But it was finally settled in *Fouldes v. Willoughby*⁴¹ that a mere taking without any intention to exercise dominion over the chattel is not a conversion.

§ 36. What is Conversion

A conversion is an act of wilful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use

³⁷ *General and Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd.* [1963] 1 W.L.R. 649.

³⁸ *The Arpad* [1934] P. 189, 232.

³⁹ *Williams v. Gesse* (1837) 3 Bing.N.C. 849.

⁴⁰ (1599) Cro.Eliz. 824; (1604) Cro.Jac. 50; cf. *Kinaston v. Moore* (1605) Cro.Car. 89.

⁴¹ (1841) 8 M. & W. 540. See below, § 36.

and possession of it. Two elements are combined in such interference: (1) a dealing with the chattel in a manner inconsistent with the right of the person entitled to it, and (2) an intention in so doing to deny that person's right or to assert a right which is in fact inconsistent with such right.⁴² But where the act done is necessarily a denial of the other's right or an assertion of a right inconsistent with it, intention does not matter.⁴³ Conversion may consist in an act deliberately done inconsistent with another's right, though the doer may not know of or intend to challenge the property or possession of that other.

Interference necessary

In order to amount to conversion the act done with respect to the chattel must have been one of wilful and wrongful interference. He who so interferes with a chattel acts at his own risk, and if the loss of the chattel does in fact (whether intended or not) result from his act, he is liable for the value of it in an action of trover. In the absence, however, of a wilful and wrongful interference there is no conversion, even if by the negligence of the defendant the chattel is lost or destroyed. Thus in *Ashby v. Tolhurst* "a car-park attendant allowed a stranger, who had neither the ticket nor the key for a car which had been left in the parking-ground under a contract, to take the car away. His employers were not liable to the owner of the car for conversion."⁴⁴ Again a bailee who by accident loses the goods entrusted to him is not liable in trover but merely in detinue or assumpsit as when "Trover for a coat and pantaloons" was brought against the owner of a public-house at Oxford "frequented by farmers."⁴⁵ But if he wrongfully and mistakenly delivered the chattel to the wrong person, or refused to deliver it to the right person, he could be sued for a conversion. This distinction is not a mere matter of form or a technicality of the old law of procedure but a subsisting principle of modern

⁴² *Caston Publishing Co. v. Sutherland Publishing Co.* [1939] A.C. 178, 202, 189; *Penfolds Wines Pty. Ltd. v. Elliott* (1946) 74 C.L.R. 204, 229.

⁴³ See below, § 37.

⁴⁴ [1937] 2 K.B. 242.

⁴⁵ In such a case there may be liability for breach of an occupier's duty to his visitors: see below, § 107.

⁴⁶ *Williams v. Gesse* (1837) 3 Bing.N.C. 849.

substantive law.⁴⁷ If the plaintiff alleges the conversion of a number of chattels, it is not necessary to particularise them item by item: a general description of their nature and value is sufficient.⁴⁸

(1) Conversion by taking

Every person is guilty of a conversion who, without lawful justification, takes a chattel out of the possession of anyone else with the intention of exercising a permanent or temporary dominion over it, because the owner is entitled to the use of it at all times.⁴⁹ It is no defence that restoration has become impossible, even though no permanent taking was intended and the impossibility has resulted from no act or default of the defendant but solely through the loss or destruction of the property by some inevitable accident or the wrongful act of some third person. For he who wrongfully takes possession of another's goods has them at his own risk and must in all events either return them or pay for them.^{49a}

But a mere taking unaccompanied by an intention to exercise such a dominion is no conversion, though it is actionable as a trespass *de bonis asportatis*. So the mere act of wrongfully removing a chattel from one place to another, without intent to assume possession of it or to deprive the owner of possession, is not in itself a conversion, but is mere trespass. Thus in *Fouldes v. Willoughby*⁵⁰ the plaintiff went on board the defendant's ferry-boat to cross from Birkenhead to Liverpool, having with him two horses; the defendant wrongfully refused to carry the horses and told the plaintiff that he must take them ashore. The plaintiff refused to do so and the defendant took the horses from him and put them on shore. The plaintiff remained on board the ferry-boat and was conveyed across the river. In an action of trover it was held that the mere act of removing the horses from the boat, although wrongful, and actionable as a trespass, did not amount to the wrong of conversion. "The simple removal of these horses by the defendant," said Lord Abinger C.B.,⁵¹ "for a purpose wholly unconnected with any

⁴⁷ *The Arpad* [1934] P. 189, 231-232.

⁴⁸ *Brightside Co-operative Society v. Phillips* [1964] 1 W.L.R. 185.

⁴⁹ *Fouldes v. Willoughby* (1841) 8 M. & W. 540, 548.

^{49a} See below, pp. 156-157.

⁵⁰ (1841) 8 M. & W. 540.

⁵¹ *Ibid.*, at 547.

the least denial of the right of the plaintiff to the possession and enjoyment of them, is no conversion of the horses.”⁵²

(2) Conversion by detention

The detention of a chattel amounts to a conversion only when it is adverse to the owner or other person entitled to possession—that is to say, the defendant must have shown an intention to keep the thing in defiance of the plaintiff.⁵³ Merely to be in possession of a chattel without title is not a conversion,⁵⁴ nor indeed is it a tort of any kind. Thus if a bailee merely holds over after the end of the period for which the chattel was bailed to him, he may be liable for a breach of contract, but he is not guilty of conversion or of any other tort.⁵⁵ So he who finds a chattel lost cannot be sued for a conversion, however long he keeps it, unless by refusing to give it up or in some other way he shows an intention to detain it adversely to the owner. No one is bound, save by contract, to take a chattel to the owner of it; his only obligation is not to prevent the owner from getting it when he comes for it.⁵⁶ This rule is not a mere peculiarity of the action of trover, for it is equally applicable to all forms of action in tort which are based on the detention of a chattel.

Demand and refusal

The usual method of proving that a detention is adverse within the meaning of this rule is to show that the plaintiff demanded the delivery of the chattel, and that the defendant refused or neglected to comply with the demand.⁵⁷ The demand must be unconditional in its terms,⁵⁸ specify the goods which the plaintiff requires⁵⁹ and be brought to the knowledge of the defendant.⁶⁰ Demand and refusal, however, is not the sole

⁵² The dicta to the effect that wherever trespass *de bonis asportatis* will lie, trover also will lie, although they gained the adhesion of Salmond, must be regarded as too wide; *Leitch & Co. v. Leydon* [1931] A.C. 90, 103–109; *Beaman v. A.R.T.S. Ltd.* [1948] 2 All E.R. 89, 92.

⁵³ *Clayton v. Le Roy* [1911] 2 K.B. 1031, 1052.

⁵⁴ *Caxton Publishing Co. v. Sutherland Publishing Co.* [1939] A.C. 178, 202.

⁵⁵ It may be otherwise if the bailee acts in a manner totally repugnant to the terms of the bailment: see below, § 39.

⁵⁶ This sentence was cited with approval by Lord Denning M.R. in *Capital Finance Co. Ltd. v. Bray* [1964] 1 W.L.R. 323, at 329.

⁵⁷ *Capital Finance Co. Ltd. v. Bray* [1964] 1 W.L.R. 323.

⁵⁸ *Rushworth v. Taylor* (1842) 3 Q.B. 699.

⁵⁹ *Abington v. Lipscomb* (1841) 1 Q.B. 776.

⁶⁰ *King v. Walsh* [1932] I.R. 178.

method in which an adverse detention may be proved. If wrongful detention can be established without proving a demand there is a good cause of action.⁶¹ Presumably any conduct of the defendant which shows that he not merely possesses the goods, but intends to hold them in defiance of the plaintiff and to deprive him of the possession of them is sufficient to constitute a conversion, even though there has been no formal demand for restitution. Thus if a person is entrusted with a pipe of wine and bottles it there is some evidence of a conversion even though none of the wine be actually drunk.⁶² A failure to deliver up goods on demand is not in itself a conversion if at the time of the demand they are no longer in the power or possession of the defendant: as when they are already destroyed or consumed or have already got into the possession of some other person. No one can convert a chattel by refusing to give it up when he no longer has it; this is so even if it is due to his own act or default that delivery is no longer possible,⁶³ though he may be liable for some prior act of conversion.

It is possible that in one case there is no conversion even though there is an adverse detention. If A's chattel comes on to B's land neither by accident nor by the act of B nor by the act of a felonious third party, it is probably the law that B is not guilty of a conversion, even though he will not either allow A to retake his chattel or himself restore it, provided that no inference can be drawn from his attitude of an assertion of title or an exercise of dominion over the goods.⁶⁴

(3) Conversion by wrongful delivery

Every person is guilty of a conversion who, without lawful justification, deprives a person of his goods by delivering them to someone else so as to change the possession.⁶⁵ The leading case is *Hollins v. Fowler*.⁶⁶ A rogue obtained Fowler's cotton, and offered it for sale to Hollins, a broker; Hollins sold and

⁶¹ *London Jewellers Ltd. v. Sutton* (1934) 50 T.L.R. 193.

⁶² *Philpott v. Kelley* (1835) 3 A. & E. 106.

⁶³ *Williams v. Gesse* (1837) 3 Bing.N.C. 849. See also *Granger v. George* (1826) 5 B. & C. 149; *Betts v. Receiver for Metropolitan Police District* [1932] 2 K.B. 595.

⁶⁴ Below, § 231.

⁶⁵ It is no conversion to give the custody of the goods to your own servant, for legally they still remain in your possession.

⁶⁶ (1875) L.R. 7 H.L. 757.

delivered it to Micholls & Co., who worked it into yarn. Hollins accounted for the proceeds to the rogue, who disappeared. Hollins was liable in conversion to Fowler, even though he had acted in good faith and obtained only a broker's commission from Micholls & Co. So an auctioneer who sells and delivers stolen property or property subject to a bill of sale is liable to the true owner or to the bill of sale holder, even though ignorant of any such adverse title, and even though he has already paid over the proceeds to his own client.⁶⁷

(4) Conversion by wrongful disposition

Every person is guilty of a conversion who, without lawful justification, deprives a person of his goods by giving some other person a lawful title to them. There are certain cases in which a person in possession of goods to which he has no title can nevertheless effectively, though wrongfully, so dispose of them by sale, pledge, or otherwise that he confers a good title to them on someone else. Any such disposition amounts to a conversion as against the true and original owner, for by the creation of this adverse title he has been deprived of his property. This is the case, for example, with a sale in market overt, or with a wrongful disposition made by a vendor or purchaser of goods who retains or obtains possession of them,⁶⁸ or by one who has a motor-vehicle on hire-purchase.⁶⁹ Another example arises where A hands over to B the goods of C in such circumstances as to create a lien or special property in B—"If a person take my horse to ride and leave him at an inn that is a conversion; for though I may have the horse on sending for him and paying for the keeping of him, yet it brings a charge on me."⁷⁰ But a bailee of goods may have the express or implied authority of the owner to create a repairer's lien; this is the position of one who has a motor-car or other chattel under a hire-purchase agreement.⁷¹ In most of such cases, indeed, the wrongful disposition is also a wrongful delivery and therefore is a conversion for that reason also, but this coincidence is not essential.⁷² It seems,

⁶⁷ *Consolidated Co. v. Curtis* [1892] 1 Q.B. 495.

⁶⁸ Sale of Goods Act, 1893, ss. 22, 25.

⁶⁹ Hire-Purchase Act, 1964, s. 27.

⁷⁰ *Syeds v. Hay* (1791) 4 T.R. 260, at 264, per Buller J.

⁷¹ *Tappenden v. Artus* [1964] 2 Q.B. 185. *Aliter* if the agreement has been validly determined by the finance company.

⁷² *Contra*, Benjamin, *Sale*, p. 41.

however, that in order to give rise to civil liability it is not enough to attempt to sell another's goods,⁷³ or even to sell them without delivering them to the purchaser or to his order, for a mere sale or other attempted disposition unaccompanied by delivery and ineffectual to divest the plaintiff's title to the property is not a conversion.⁷⁴

(5) Conversion by wrongful destruction

Every person is guilty of a conversion who, without lawful justification, wilfully consumes or otherwise destroys a chattel belonging to another person.⁷⁵ Mere damage, however, which falls short of actual destruction, is not in itself a conversion.⁷⁶ The test of destruction, as opposed to mere damage, is presumably the disappearance of the identity of the article. Grapes are presumably destroyed when they are turned into wine, cotton when it is woven into cloth, corn when it is ground into flour.⁷⁷

(6) Conversion of documents

The conversion of cheques is a topic of importance and some difficulty, for conversion means conversion of chattels, and the relation of bank to customer is that of debtor and creditor. As no specific coins in a bank are the property of any specific customer, a bank which pays part of what it owes to its customer to some other person not authorised to receive it is not at first sight converting its customer's chattels. Again, a bank which collects a cheque borrows from its customers the proceeds when collected, and in collecting exhausts the operation of the cheque. "The difficulty has been surmounted by treating the conversion as of the chattel, the piece of paper, the cheque under which the money was collected, and the value of the chattel converted as the money received under it."⁷⁸ "It may be that the claim in trover of the cheque is a somewhat artificial and cumbrous way of arriving at the remedy, but it is well established by a long

⁷³ But there may be a criminal prosecution for fraudulent conversion in such a case: *Rogers v. Arnott* [1980] 2 Q.B. 244.

⁷⁴ *Consolidated Co. v. Curtis* [1892] 1 Q.B. 495, 498.

⁷⁵ *Hollins v. Fowler* (1875) L.R. 7 H.L. 757, 768.

⁷⁶ Where the chattel continues to exist as such, there may be trespass, but there is no conversion: *Simmons v. Lillystone* (1853) 8 Ex. 481.

⁷⁷ See below, § 44.

⁷⁸ *Per Scrutton L.J. in Lloyds Bank v. Chartered Bank, etc.* [1929] 1 K.B. 40, at 55-56.

series of authorities. The law regards the substance of the transaction and gives an adequate remedy for the wrong.”⁷⁹ This rule is not limited to documents which are, or are in the nature of, negotiable instruments: but it may include documents which are evidence of a chose in action—*e.g.*, trading stamps.⁸⁰ If a cheque has been converted, and the collecting bank has acted without negligence, it may be protected under the Cheques Act, 1957, s. 4, which replaces the Bills of Exchange Act, 1882, s. 82.⁸¹

(7) Miscellaneous forms of conversion

Every person is guilty of a conversion who, in any other way than those mentioned in the preceding sections, causes the loss of a chattel by any act of wilful interference without lawful justification. It has even been held that the use of another’s motor-car for smuggling, entailing its liability for forfeiture to the Crown, amounts to a conversion.⁸² So he who without lawful justification lets loose another’s dog from his chain, or opens the cage in which another keeps a bird, or frightens another’s cattle so that they escape from the place in which they are kept, is liable for any loss of the property which so results.⁸³ So there may be conversion even though the defendant has never been in physical possession of the goods, if he has dealt with them in such a way as to amount to an absolute denial and repudiation of the plaintiff’s right.⁸⁴ But it is submitted that even an absolute denial and repudiation of the plaintiff’s right, if unaccompanied by circumstances which make such denial a “dealing” with the goods, does not constitute conversion,⁸⁵ although it may amount to injurious falsehood,⁸⁶ or else the

⁷⁹ *Per* Lord Reading C.J. in *Morison v. London County and Westminster Bank* [1914] 3 K.B. 356, at 365–366.

⁸⁰ *Building, etc. Holidays Scheme Ltd. v. Post Office* [1965] 2 W.L.R. 72.

⁸¹ See Borrie, “Problems of the Collecting Bank” (1960) 23 M.L.R. 16.

⁸² *Moorgate Mercantile Credit Co. Ltd. v. Finch* [1962] 1 Q.B. 701.

⁸³ So binding together sheets containing matter infringing copyright with innocent sheets so as to form a volume is a conversion of the copyright sheets: *Carton Publishing Co. v. Sutherland Publishing Co.* [1939] A.C. 178.

⁸⁴ This sentence was cited by Scrutton L.J. in *Oakley v. Lyster* [1931] 1 K.B. 148, 150.

⁸⁵ *England v. Cowley* (1873) L.R. 8 Ex. 126. *Oakley v. Lyster* [1931] 1 K.B. 148 does not appear to be to the contrary. See Goodhart, Note, 47 L.Q.R. 168.

⁸⁶ Above, p. 146.

plaintiff may obtain a declaration that the defendant has no right to the goods.⁸⁷

§ 37. Acts not amounting to Conversion

(1) Mere receipt of chattels no conversion

We have already seen that the mere possession of goods without title is neither a conversion nor any other kind of tort.⁸⁸ The only detention that is actionable is adverse detention—a withholding of possession from the person entitled to it. It seems to follow logically from this that merely to receive goods in good faith by way of pledge, sale or otherwise from a person who has no title to them is not a conversion by the recipient, who commits no tort until he refuses to deliver them to the true owner or wrongfully disposes of them. This has been held to be the law in the case of a person taking goods by way of deposit. In *Spackman v. Foster*⁸⁹ certain deeds belonging to the plaintiff were fraudulently taken from him and pledged in the year 1859 with the defendant, who received them in good faith and in ignorance of the plaintiff's title. In the year 1882 the plaintiff discovered the loss of the deeds and demanded them from the defendant, who refused to give them up and pleaded the Statute of Limitations. It was held that no cause of action accrued until the demand and refusal, and that therefore the defendant was liable in trover although he had been in possession of the deeds for twenty-three years.

Except on a sale

But where there is a taking by sale or in any other way than by pledge the rule is different. In such a case the voluntary reception of the goods⁹⁰ amounts to a conversion, however innocent the recipient may be. "Certainly a man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect."⁹⁰ The rule

⁸⁷ A procedure used in *Loudon v. Ryder* (No. 2) [1953] Ch. 423.

⁸⁸ (1883) 11 Q.B.D. 99. In so far as this case is an authority on limitation of actions, it has been overruled by the Limitation Act, 1939, s. 3 (see below, § 224): *Beaman v. A.R.T.S. Ltd.* [1948] 2 All E.R. 89, 98.

⁸⁹ For the position of an involuntary bailee, see below, p. 157.

⁹⁰ *McCombie v. Davis* (1805) 6 East 538, at 540, *per* Lord Ellenborough C.J. The defendant was an innocent pledgee, but this dictum was cited

is an illustration of the principle that persons deal with the property in chattels or exercise acts of ownership over them at their peril.⁹¹ Hence one who innocently buys and takes delivery⁹² of goods from another who has no authority to sell them is liable in conversion.⁹³ A familiar situation in which this rule applies is when a banker collects for a customer a cheque to which the customer has no title or a defective title; the banker is liable in conversion to the true owner of the cheque unless he can show that he is protected by the Cheques Act, 1957, s. 4.⁹⁴

(2) Redelivery no conversion

It further follows that if he who innocently acquires possession of another's goods by way of deposit redelivers them to him from whom he got them, before he has received notice of the plaintiff's claim to them, he is free from responsibility. He has not deprived the plaintiff of his property, for that property is now in exactly the same position as if the defendant had never interfered with it at all. "A warehouseman," said Blackburn J.⁹⁵ in *Hollins v. Fowler*,⁹⁶ "with whom goods have been deposited is guilty of no conversion by keeping them or restoring them to the person who deposited them with him, though that person turns out to have no authority from the true owner."⁹⁷

Delivery to third party

What shall be said, however, if the innocent holder has delivered the goods not to the person from whom he received

with approval in the cases concerning collecting bankers in note 94. It was necessarily distinguished in *Spackman v. Foster*, but the authority of that case is now doubtful: above, n. 88. Still, in the case of a pledge, unlike that of a sale, it is not necessary for the transferor to show title.

⁹¹ Below, § 39.

⁹² As the vendor in a contract of sale under which the goods have not been delivered is not liable in conversion the buyer must also escape liability.

⁹³ *Hilbery v. Hatton* (1864) 2 H. & C. 822.

⁹⁴ *Morison v. London County and Westminster Bank* [1914] 3 K.B. 356, 364; *Lloyds Bank v. Chartered Bank* [1929] 1 K.B. 40, 69; *Bute (Marquess of) v. Barclays Bank Ltd.* [1955] 1 Q.B. 202. These cases are an interesting illustration of how the usage or practice of a trade or profession can be influenced by judicial decisions.

⁹⁵ "A judge who knew more about these matters than anyone else": *Rogers v. Lambert* [1891] 1 Q.B. 318, at 325, per Lord Esher M.R.

⁹⁶ (1875) L.R. 7 H.L. 757, at 767.

⁹⁷ *Aliter* if he has notice of the claim of the true owner. He should inter-plead. If he does not, he delivers at his peril: *Winter v. Bancks* (1901) 84 L.T. 504.

them but at his order to some third person? As when a carrier receives stolen goods from a consignor, and delivers them to the consignee; or a warehouseman delivers such goods to him to whom the delivery warrant has been transferred by the depositor. If in such a case the defendant acts in good faith and without any knowledge that the delivery made by him is in pursuance of some sale or other disposition purporting to affect the title and not merely the possession of the goods, it is probable that he is under no liability. He is a mere conduit-pipe. In a sentence, the carrier is not liable because he merely changes the position of the goods and not the property in them."⁹⁸ "On principle, one who deals with goods at the request of the person who has actual custody of them in the bona fide belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such nature as would be excused if done by the authority of the person in possession, if he was the finder of goods or entrusted with their custody."⁹⁹ On this principle a carrier who merely receives and delivers goods in the ordinary way is not liable in trover merely because the transaction was a conversion on the part of the consignor.¹ Similarly, the solicitor of a bankrupt who receives after-acquired property on behalf of his client and transfers it to another agent (even with knowledge that that agent has been instructed to sell it) is not liable in conversion at the suit of the trustee in bankruptcy.²

A doubtful case

If, however, a carrier, warehouseman, agent, or bailee has actual knowledge that his delivery of the goods is part of a transaction affecting the title and not merely the possession, the question of his liability would seem to be still an unsettled point in the law of conversion. If *National Mercantile Bank v. Ry mill* ³ is well decided,⁴ there is no liability even under these circumstances. In this case it was held by the Court of Appeal that an auctioneer with whom the goods of the plaintiff had been

⁹⁸ *Barker v. Furlong* [1891] 2 Ch. 172, 182.

⁹⁹ *Hollins v. Fowler* (1875) L.R. 7 H.L. 757, at 766, per Blackburn J.

¹ *Glyn, Mills & Co. v. East India Dock Co.* (1881) 6 Q.B.D. 475, 491.

² *Re Samuel* (No. 2) [1945] Ch. 408.

³ (1881) 44 L.T. 767.

⁴ It was approved in *Consolidated Co. v. Curtis* [1892] 1 Q.B. 495.

wrongfully deposited for sale was not liable for a conversion, although he had delivered them at the request of the vendor to a person to whom, as the auctioneer knew, the vendor had sold them by private contract. It is difficult to reconcile this decision with earlier cases such as *Stephens v. Elwall*,⁵ and it is contrary to the opinion of Blackburn J. in *Hollins v. Fowler*,⁶ but may be upheld on the ground that the auctioneer had not himself sold the goods. If well decided it is an authority for this principle: that a bailee commits no conversion merely by redelivering the goods to his bailor or to the order of his bailor, even with the knowledge that the transaction is a sale or other disposition of the title, provided that he has no notice of any adverse claim on the part of the plaintiff. It is clearly otherwise, however, if the bailee has not merely delivered with knowledge of the sale, but has himself sold as well as delivered, even though he sells merely as an agent and without claiming any beneficial interest in the property for himself.⁷

§ 38. Conversion by Estoppel⁸

A defendant who has in truth committed no conversion may be held liable for one because he is estopped by his own act from alleging the fact which constitutes his defence: for example, that he has never had possession of the goods, or that he is no longer in possession of them, or that the plaintiff has no title to them.⁹ Thus a bailee is estopped from denying the title of his bailor, and therefore a refusal to redeliver the property is a conversion, even though in fact the plaintiff has no title to it.¹⁰ Nor does it make any difference whether the plaintiff has no title at the time of the bailment, or has lost his title since the bailment. Thus in *Rogers, Sons & Co. v. Lambert & Co.*¹¹ the plaintiffs bought certain copper from the defendants and paid for it, but it remained in the defendants' possession as warehousemen for the

⁵ (1815) 4 M. & S. 259.

⁶ (1875) L.R. 7 H.L. at 767.

⁷ *Consolidated Co. v. Curtis* [1892] 1 Q.B. 495.

⁸ This is a convenient expression, though estoppel is in general only a rule of evidence and not a cause of action.

⁹ *Seton, Laing & Co. v. Lafone* (1887) 19 Q.B.D. 68.

¹⁰ *Biddle v. Bond* (1865) 6 B. & S. 225. See Paton, *Bailment in the Common Law*, s. 85.

¹¹ [1891] 1 Q.B. 318.

plaintiffs. The plaintiffs then resold the copper to a third person, who paid them for it. The plaintiffs having thereafter demanded possession, the defendants refused to deliver on the ground that the plaintiffs had no longer any title to the copper. It was held, however, by the Court of Appeal that the defendants were estopped as bailees from raising any such defence and that they were liable in trover for the full value of the property. It would have been different if they had been defending the action by authority of the third party, for the estoppel of a bailee no longer exists if he has already, on the demand of the true owner, given up possession to him, or if he defends the action on his behalf, and by his authority.¹²

§ 39. Ineffectual Defences

(1) Mistake

Although a conversion is necessarily an intentional wrong in the sense already explained, it need not be knowingly wrongful. A mistake of law or fact is no defence to anyone who intentionally interferes with a chattel in a manner inconsistent with the right of another.¹³ He does so *suo periculo* and takes the risk of the existence of a sufficient lawful justification for the act; and if it turns out that there is no justification, he is just as responsible in an action of conversion as if he had fraudulently misappropriated the property. "Persons deal with the property in chattels or exercise acts of ownership over them at their peril."¹⁴ Thus an auctioneer who honestly and ignorantly sells and delivers property on behalf of a customer who has no title to it is liable for its value to the true owner, even though he has already paid the proceeds of the sale to his own client.¹⁵ The facts of the leading case of *Hollins v. Fowler*¹⁶ are another illustration.

¹² *Rogers v. Lambert* [1891] 1 Q.B. 328; *Kahler v. Midland Bank Ltd.* [1950] A.C. 24, 38. For pleading the *ius tertii*, see pp. 161-62. The remedy of a bailee against whom adverse claims are made is to take interpleader proceedings. The estoppel of a bailee is closely analogous to the rule that a possessory title is good against all but the true owner. It is possible, indeed, that the former rule is in truth merely a particular application of the latter. See below, § 41.

¹³ Sometimes the defence of agency of necessity may be available: see above, § 11.

¹⁴ *Hollins v. Fowler* (1874) L.R. 7 Q.B. at 639, *per* Cleasby B.

¹⁵ *Consolidated Co. v. Curtis* [1892] 1 Q.B. 495. "That is one of the risks of their profession": *Sachs v. Miklos* [1948] 2 K.B. 23, at 37, *per* Lord Goddard C.J.

¹⁶ (1875) L.R. 7 H.L. 757: see above, § 86.

(2) Default of the plaintiff

It has been said that mistake is no defence even if it has been induced by the negligence of the plaintiff, unless the negligence consists of a breach of duty owed by the plaintiff to the defendant and is the proximate cause of the loss.¹⁷ Scrutton L.J. said ¹⁸: "If my butler for a year has been selling my vintage wines cheap to a small wine merchant, I do not understand how my negligence in not periodically checking my wine book will be an answer to my action against the wine merchant for conversion." On the other hand, it must be remembered that this was said before the enactment of the Law Reform (Contributory Negligence) Act, 1945. There is good reason to believe that contributory negligence is now a defence in at least some cases of conversion.¹⁹

Again, if a person signs documents in blank and hands them over to an agent for the purpose of raising money, there may be a duty of care with regard to the preparation and custody of the documents.²⁰ The general rule has been the subject of powerful criticism,²¹ and the Law Reform Committee is now considering the matter.

(3) Remoteness of damage

If the defendant has thus intentionally interfered with a chattel without lawful justification and loss of the chattel does in fact result from the interference, it is no defence that such a loss was not intended, or even that it was not the natural or probable result. The question is not whether the defendant intended to deprive the plaintiff of his property, or whether he knew or ought to have known of the probability of such a result, but merely whether his wrongful interference did as a matter of fact produce that result. In *Hiort v. Bott* ²² the plaintiffs, by a mistake fraudulently induced by their own agent, consigned

¹⁷ *Farquharson Bros. & Co. v. King & Co.* [1902] A.C. 325, 335-336; *Jerome v. Bentley & Co.* [1952] 2 All E.R. 114, 118.

¹⁸ *Lloyds Bank v. Chartered Bank* [1929] 1 K.B. 40, at 60. ("I always like, if I can, to find authority from Scrutton L.J., who was one of the greatest judges of my time": *Kemshead v. British Transport Commission* [1958] 1 W.L.R. 173, at 174, per Lord Goddard C.J.)

¹⁹ *Helson v. McKenzies Ltd.* [1950] N.Z.L.R. 878; Williams, *Joint Torts*, pp. 210-212; Burnett, "Conversion by an Involuntary Bailee" (1960) 76 L.Q.R. 864.

²⁰ *Mercantile Credit Co. Ltd. v. Hamblin* [1964] 1 W.L.R. 423.

²¹ *Ingram v. Little* [1961] 1 Q.B. 31, 73-74, per Devlin L.J.

²² (1874) L.R. 9 Ex. 86.

certain barley to the defendant which he had not ordered. They also sent him a delivery order which made the barley deliverable "to the order of consignor or consignee" to enable him to obtain it from the carrier. The plaintiffs' agent thereupon informed the defendant that the consignment was a mistake and induced him to indorse and hand over the delivery order to him (the agent) in order that the goods might be obtained by him from the carrier and redelivered to the plaintiffs. The agent thus obtained possession of the barley, sold it, and absconded with the proceeds; and the defendant was held liable in conversion for its value. It will be noted that the defendant in this case, although he had never come into possession of the goods, had done an act which affected the title in them which he was not obliged to do at all—for if he had done nothing the terms of the delivery order would have ensured that the barley would have stood at the order of the plaintiff consignors. His position is thus clearly distinguishable from that of an involuntary bailee, who is in general liable only if the unauthorised act which has deprived the plaintiff of his property is also a negligent one.²³

(4) Defendant acting for account of another

It is not necessary that the defendant should have acted on his own account, or have converted the goods to his own use. He is equally liable if he has acted on behalf and for the benefit of some other person as his agent or servant.²⁴ On the other hand, a merely ministerial dealing with the goods at the request of an apparent owner having the actual control of them is not a conversion.²⁵ In such a case the agent is a "mere conduit-pipe."²⁶ It is by no means easy to find the exact line of delimitation in these cases.²⁷ Even when the act is done for the supposed benefit of the true owner and with the honest intention of preserving or restoring the property, it will amount to a conversion if done without lawful justification and if it results

²³ *Elvin & Powell Ltd. v. Plummer, Roddis Ltd.* (1933) 50 T.L.R. 158; Burnett, "Conversion by an Involuntary Bailee" (1960) 76 L.Q.R. 364. See also below, § 281.

²⁴ *Stephens v. Elwall* (1815) 4 M. & S. 259.

²⁵ *National Mercantile Bank v. Rymill* (1881) 41 L.T. 767; *Hollins v. Fowler* (1875) L.R. 7 H.L. 757, 767.

²⁶ *Hollins v. Fowler* (1875) L.R. 7 H.L. 757, 789.

²⁷ See above, § 87.

in fact in a loss of the property: as if I find A's goods which I wrongly believe to have been lost or mislaid by him, and hand them to B to take to A, and B misappropriates them.²⁸

(5) Loss not permanent

The loss or deprivation of possession suffered by the plaintiff need not be permanent. The duration of the dispossession is relevant with respect to the measure of damages, but makes no difference in the nature of the wrong.²⁹

§ 40. The Title of the Plaintiff³⁰

Whenever goods have been converted, an action will lie at the suit of any person in actual possession or entitled at the time of the conversion to the immediate possession of them. It is not necessary for the plaintiff to show that he is the owner of the goods. One who has actual possession or an immediate right to possession at the time of the conversion can sue even though he is not the owner of the property.³¹ Hence not merely can a bailee at will sue³² but also his bailor³³ and one who has a lien over goods.³⁴ Conversely a person not so entitled cannot sue in conversion, even though he is the owner of the property. Usually the defect in his right to immediate possession arises from an adverse right of possession in a third party, but a defect arising from other causes may be equally fatal.³⁵ We shall deal later with the remedies for injuries to reversionary interests in chattels.³⁶

In certain cases, however, a person who has a merely reversionary interest is remitted to the right of immediate possession

²⁸ See *Consolidated Co. v. Curtis* [1892] 1 Q.B. 495.

²⁹ This passage was cited with approval by Williams J. in *Penfold's Wines Pty., Ltd. v. Elliott* (1946) 74 C.L.R. 204, at 243.

³⁰ Warren, "Qualifying as Plaintiff in an Action for a Conversion" (1936) 49 Harv.L.Rev. 1084.

³¹ *The Winkfield* [1902] P. 42; *Bute (Marquess of) v. Barclays Bank Ltd.* [1955] 1 Q.B. 202. Similarly, although an equitable title is not sufficient to found an action at common law for conversion or any other injury, yet if an equitable owner has a right to immediate possession, he can sue without joining his trustee as co-plaintiff: *Healey v. Healey* [1915] 1 K.B. 938.

³² *Burton v. Hughes* (1824) 2 Bing. 173, 175.

³³ *U.S.A. v. Dollfus Mieg et Cie* [1952] A.C. 582.

³⁴ *Rogers v. Kennay* (1846) 9 Q.B. 592.

³⁵ *Kahler v. Midland Bank Ltd.* [1950] A.C. 24, 38, 55.

³⁶ Below, § 48.

by the very act of conversion itself, which causes in certain circumstances a forfeiture and determination of the particular interest in possession. "Any act or disposition which is wholly repugnant to or as it were an absolute disclaimer of the holding as bailee revests the bailor's right to possession, and therefore also his immediate right to maintain trover or detinue even where the bailment is for a term or is otherwise not recoverable at will, and so *a fortiori* in a bailment determinable at will."³⁷ Thus if the hirer under a contract of hire-purchase sells the article bailed to him, the lessor accordingly becomes entitled to immediate possession and can therefore sue either the hirer or the auctioneer who has effected the sale or the purchaser in conversion and not merely for an injury to his reversionary interest.³⁸

Possessory title sufficient: the *jus tertii*

Mere *de facto* possession is, as against a stranger, a sufficient title to support an action for a conversion, for as against a wrongdoer possession is title, and the defendant cannot plead the *jus tertii* unless he defends on behalf and by the authority of the true owner, or has already made satisfaction to him.³⁹

Finders⁴⁰

The protection which the law affords to finders of chattels is perhaps the most familiar illustration of this principle. In 1718, in the famous case of *Armory v. Delamirie*,⁴¹ a chimney sweeper's boy who had found a jewel recovered its full value in trover from a jeweller to whom he had handed it to be valued but who had refused to return it to him. Although the report is

³⁷ Pollock and Wright, *Possession*, pp. 132-133. This passage was approved by Dixon J. in *Penfolds Wines Pty. Ltd. v. Elliott* (1946) 74 C.L.R. 204, 227; by Cohen L.J. in *North General Wagon and Finance Co., Ltd. v. Graham* [1950] 2 K.B. 7, 15, and by Devlin J. in *Alexander v. Railway Executive* [1951] 2 K.B. 882, 888.

³⁸ *North General Wagon and Finance Co. Ltd. v. Graham* [1950] 2 K.B. 7. The position may be different if the contract provides that the finance company may only terminate the hire in some particular way, e.g., by giving notice to the hirer: *Reliance Car Facilities, Ltd. v. Roding Motors* [1952] 2 Q.B. 844.

³⁹ *Glenwood Lumber Co. Ltd. v. Phillips* [1904] A.C. 405, 410.

⁴⁰ See Goodhart, *Essays*, Chap. 4; D. R. Harris in *Oxford Essays in Jurisprudence* (ed. Guest), Chap. 4.

⁴¹ (1721) 1 Str. 505.

silent on the point, it seems legitimate to assume that the jewel had been found in a chimney.⁴² The principle has been followed ever since. In 1851 in *Bridges v. Hawkesworth*⁴³ the finder of some banknotes lying in the public part of a shop was held entitled to them as against the owner of the shop. This was followed again in 1945 in *Hannah v. Peel*,⁴⁴ in which the finder of a brooch lying loose in the crevice on top of a window-frame was held entitled to it as against the owner of the house, who had never in fact been in occupation of the house. But to these authorities an exception, easily stated but difficult to explain, has been developed. If the article found is attached to or lying under the surface of the land, the owner of the land is entitled to it in priority to the finder.⁴⁵ Thus in *London Corporation v. Appleyard*⁴⁶ a safe containing banknotes was found by two workmen in the basement wall of a house which they were demolishing. The lessee of the premises was held to have priority over the workmen.⁴⁷ It is not clear whether it makes any difference in what mode the plaintiff obtained the possession on which he relies, but possibly the finder must be an innocent finder.⁴⁸ It is also well settled that in such cases the measure of damages is the same as if the plaintiff's title were indisputable: *omnia praesumuntur contra spoliatorem*.⁴⁹

Duration of possessory title

A possessory title once acquired continues although the possessory owner has delivered possession to a bailee, agent, or other person who holds the property on his behalf returnable at will. Thus if A finds goods, and deposits them with B, A has a right of action not merely against B but also against any other person who converts the property.⁵⁰ A possessory title once

⁴² Note that the owner of the chimney was not a party to the proceedings.

⁴³ 21 L.J.Q.B. 75.

⁴⁴ [1945] K.B. 509.

⁴⁵ *Elwes v. Brigg Gas Co.* (1886) 33 Ch.D. 562; *South Staffordshire Water Co. v. Sharman* [1896] 2 Q.B. 44. One who finds articles on vehicles of the London Transport Board is guilty of a petty offence if he does not hand them over to the Board, but this would not affect his title in a civil suit.

⁴⁶ [1963] 1 W.L.R. 982.

⁴⁷ The men were given rewards of £500 each by the London Corporation: *The Times*, April 5, 1963.

⁴⁸ *Buckley v. Gross* (1868) 3 B. & S. 566, 574.

⁴⁹ *Armory v. Delamirie* (1721) 1 Str. 505.

⁵⁰ *Barker v. Furlong* [1891] 2 Ch. 172.

acquired probably also continues to exist notwithstanding a loss of the possession by the wrongful act of a stranger. Thus if A finds goods, and they are taken from him by B and sold by B to C, it is probable that A has an action of trover not only against B, but also against C. At the time of C's conversion it is true that A had no longer any subsisting possession, but he still retained the possessory title which he acquired through his former possession.⁵¹ A possessory title is divested by any rightful dispossession effected by or on behalf of the true owner: for example, the retaking of the property, or the attornment of the possessory owner's bailee to the true owner.⁵²

When the jus tertii may be pleaded

We have seen that the general principle is that the defendant cannot plead the *jus tertii*. The exceptions to this principle may be placed in two distinct categories.

(1) If the plaintiff was in actual possession, and even if the defendant got possession of the goods by a trespass against the plaintiff, the defendant can plead the *jus tertii* in three cases (but in no others): (i) When he defends the action on behalf and by the authority of the true owner⁵³; (ii) when he committed the act complained of by the authority of the true owner; (iii) when he has already made satisfaction to the true owner by returning the property to him.⁵⁴

(2) If, however, the plaintiff was not in actual possession but relies upon his right to possession, he must recover on the strength of his title, and proof of the *jus tertii* will destroy the only thing upon which he relies.⁵⁵

⁵¹ *Buckley v. Gross* (1863) 3 B. & S. 566.

⁵² *Buckley v. Gross* (1863) 3 B. & S. 566. This case depends on the authority of the police to take possession of and deal with property suspected to have been stolen. The estoppel of a bailee, on the contrary, survives such determination of the bailor's interest, and in this respect at least the rule as to title by estoppel seems to be wider than the rule as to title by possession: *Rogers v. Lambert* [1891] 1 Q.B. 818. On the whole matter, however, the law is uncertain and undeveloped.

⁵³ *Biddle v. Bond* (1865) 6 B. & S. 225. The principle in *Biddle v. Bond* is limited to bailments of chattels: it does not cover money claims by a principal against an agent: *Blaustein v. Maltz, Mitchell & Co.* [1937] 2 K.B. 142.

⁵⁴ *Eastern Construction Co. v. National Trust Co.* [1914] A.C. 197, 210. The passage in the text was cited, but not followed (no reasons being given), in *Wilson v. Lombank Ltd.* [1963] 1 W.L.R. 1294, 1297.

⁵⁵ *Leake v. Loveday* (1842) 4 M. & G. 972. See Holdsworth, H.E.L., vii, pp. 424-431, for a very clear statement upon this difficult topic and also the controversy between Atiyah and Jolly in (1955) 18 M.L.R. 97, 371.

Effect of satisfaction made to possessory owner

Payment of the value of the property to a merely possessory owner, even in pursuance of a judgment and by compulsion of law, is no defence to a subsequent action by the true owner.⁵⁶ But it is to be presumed that if a defendant has been so compelled to pay twice for a conversion committed by him, he will have a claim in quasi-contract against the possessory owner for repayment of the amount so received by him. As we have already seen, if the defendant, instead of paying damages at the suit of a possessory owner, restores the chattel to him without notice of any adverse claim this is no conversion, and he incurs no liability to the true owner.⁵⁷ Moreover, a defendant sued by a possessory owner may protect himself against an adverse claim by taking interpleader proceedings.⁵⁸

§ 41. Conversion as between Co-owners

When a chattel is held in common ownership, one of the owners cannot sue another of them in conversion unless the act of the defendant amounts to the destruction of the chattel or otherwise permanently destroys the right of the plaintiff to the possession thereof—*e.g.*, a sale in market overt.⁵⁹ Each of the co-owners is equally entitled to the possession and use of the chattel, and neither therefore commits any wrong as against the other by taking or retaining possession of it and using it for the purposes for which it is designed, even if the other is thereby prevented from making the like use of it. But if one co-owner does an act which can be justified only by claiming a right to exclusive possession, then he commits an act of conversion.⁶⁰ If any co-owner acquires from the use of the common property a greater share of the profits derived therefrom than that to which he is entitled, he does not thereby commit any tort against the other owner, whose proper remedy is an action of account.⁶¹

⁵⁶ *Attenborough v. London and St. Katharine's Dock Co.* (1878) 3 C.P.D. 450, 454.

⁵⁷ Above, § 37.

⁵⁸ Above, § 38.

⁵⁹ *Fennings v. Grenville* (1808) 1 Taunt. 241, 249.

⁶⁰ *Baker v. Barclays Bank Ltd.* [1955] 2 All E.R. 571, 576.

⁶¹ See *Jacobs v. Seward* (1872) L.R. 5 H.L. 464; *Derham*, "Conversion by Wrongful Disposal as between Co-owners" (1952) 68 L.Q.R. 507.

§ 42. Conversion and the Limitation of Actions

It often happens that two or more successive acts of conversion are committed in respect of the same property, either by the same person or by different persons, and difficult questions formerly arose as to the date from which in such cases the period of limitation under the Statute of Limitations, 1628, began to run. Section 8 of the Limitation Act, 1939, deals with both cases. Before that Act the only effect of the expiry of the period of limitation was to bar the plaintiff's right of action. Now under the Act of 1939 not only his right of action but his title to the chattel converted is extinguished as it had previously been, and still is, in the case of land under the Real Property Limitation Act, 1888.⁶² The Act of 1939 (s. 8) further provides: "Where any cause of action in respect of the conversion or wrongful detention of a chattel has accrued to any person and, before he recovers possession of the chattel, a further conversion or wrongful detention takes place, no action shall be brought in respect of the further conversion or detention after the expiration of six years from the accrual of the cause of action in respect of the original conversion or detention." So (1) where there are successive acts of conversion by the same person, as where, for example, the defendant wrongfully takes a chattel, and on a subsequent date wrongfully consumes it, or refuses to restore it on demand, or (2) where there are successive conversions by different persons, as where, for example, A wrongfully disposes of the plaintiff's chattel to B who subsequently refuses to deliver it up on demand, the cause of action is extinguished after six years from the original conversion.⁶³ The result is that the defendant who originally acquired possession unlawfully is in a better position than the defendant whose original possession was lawful. For if the defendant was lawfully

⁶² s. 34. Since July 1, 1940, English law has for the first time had a doctrine of usucapion of chattels.

⁶³ *R.B. Policies at Lloyd's v. Butler* [1950] 1 K.B. 76; cf. *Denning J. in Beaman v. A.R.T.S., Ltd.* [1948] 2 All E.R. 89 (the judgment on this point is unaffected by the decision of the C.A. in [1949] 1 K.B. 550). As to (1) the Act overrules *Miller v. Dell* [1891] 1 Q.B. 468; as to (2) it overrules *Wilkinson v. Verity* (1871) L.R. 6 C.P. 206, unless that case was correctly explained by *Salmond* (6th ed., s. 108 (2)) as one of concealed fraud. It is still treated as law in *Rosenthal v. Alderton* [1946] K.B. 374, and in *Beaman v. A.R.T.S. Ltd.* [1948] 2 All E.R. 89, 93.

in possession the time runs from the demand and refusal, no matter how long the goods have been in his possession. This has been called a "peculiarly immoral doctrine,"⁶⁴ but the rule must be read in the light of the general exception of concealed fraud.⁶⁵ If the prior act of conversion is a fraudulent one, the period of limitation runs not from the date of that conversion but from the date of its subsequent discovery by the plaintiff.

§ 43. Detinue

Detinue at the present day has two main uses.⁶⁶ In the first place, the plaintiff may desire the specific restitution of his chattels and not damages for their conversion. He will then sue in detinue, not in trover. In the second place, he will have to sue in detinue if the defendant sets up no claim of ownership and has not been guilty of trespass; for the original acquisition in *detinue sur bailment* was lawful. Detinue lies against him who once had but has improperly parted with possession.⁶⁷ It is a good defence that possession has been lost without default of the defendant, but in order to succeed the defendant must prove this affirmatively.⁶⁸ In an action of detinue, as in an action of conversion by detention,⁶⁹ the defendant must have shown an intention to keep the thing in defiance of the plaintiff. Neither the mere having the goods in the defendant's possession nor the mere omission to deliver, in the sense of taking the goods to the plaintiff, is sufficient to found an action of detinue. "*Detinet* means more than *tenet*." In order to support the action there must be a withholding of the goods and a prevention of the plaintiff from obtaining possession of them. The detention must be adverse.⁷⁰ Hence if it is desired to sue in detinue one who had possession under a bailment which has now determined, it must be shown that a demand for the return of the goods was made before action brought.⁷¹

⁶⁴ Jenks, "A Blind Spot in English Law" (1933) 49 L.Q.R. 215, 224.

⁶⁵ Below, § 224.

⁶⁶ Kiralfy (12 M.L.R. at 426) speaks of "the recrudescence of the despised action of detinue" which "is now as useful as trover."

⁶⁷ *General and Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd.* [1963] 1 W.L.R. 644.

⁶⁸ *Re S. Davis & Co Ltd.* (1945) 61 T.L.R. 408.

⁶⁹ Above, § 86.

⁷⁰ *Clements v. Flight* (1846) 16 M. & W. 42.

⁷¹ *King v. Walsh* [1932] I.R. 178.

Title of the plaintiff

The plaintiff must show that he has a right to the immediate possession of the chattel at the time of the commencement of the action, arising out of an absolute or special property in it.⁷² Such a right of possession may exist even though the chattel has been obtained under an illegal contract of sale.⁷³

The rules regarding the *jus tertii* are the same as in conversion.⁷⁴

*Form of judgment*⁷⁵

If the plaintiff is successful he obtains a judgment which may take one of three different forms: (i) for the value of the chattel as assessed, and also for damages for its detention; (ii) for the return of the chattel or recovery of its value as assessed, and also for damages for its detention; or (iii) for return of the chattel and damages for its detention. Form (i) is appropriate for ordinary articles of commerce; forms (ii) and (iii) where damages would not be a suitable remedy and specific restitution is desirable.⁷⁶

In *Rosenthal v. Alderton*⁷⁷ the Court of Appeal held that in an action of detinue the value of the goods claimed ought to be assessed as at the date of the judgment or verdict and not at that of the defendant's refusal to return the goods. The same principle applies whether the defendant has converted the goods by selling them or has refused to return them for some other reason. Where the defendant has detained and used a chattel of the plaintiff which the plaintiff as part of his business hires out to users, the measure of damages will include a reasonable sum for the hire of the chattel during the period of detention,⁷⁸

⁷² *Singh v. Ali* [1960] A.C. 167, 176.

⁷³ *Ibid.*

⁷⁴ See above, § 40.

⁷⁵ See the full discussion by Diplock L.J. in *General and Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd.* [1963] 1 W.L.R. 644, 648-652.

⁷⁶ For these circumstances, see § 44.

⁷⁷ [1946] K.B. 374. For "It was, and still is, of the essence of an action of detinue that the plaintiff maintains and asserts his property in the goods claimed up to the date of the verdict": *per* Evershed J. at 377. See also *Jarvis v. Williams* [1955] 1 W.L.R. 71.

⁷⁸ *Strand Electric Co. v. Brisford* [1952] 2 Q.B. 246. It is possible that the same principle applies where a non-profit-earning chattel has been detained: see the rules on mesne profits, below, § 218.

which may be up to the date of the judgment, and not only up to the date of the demand for its return.⁷⁹

§ 44. Specific Restitution

We have already seen that at common law the owner of chattels had no absolute right to the specific recovery of them.⁸⁰ The form of the judgment in detinue gave the defendant the choice whether he would deliver up the chattels or pay their assessed value. In special cases, however, the plaintiff could have had recourse to the discretionary jurisdiction of the Court of Chancery. By the Common Law Procedure Act, 1854, s. 78, the law was altered by empowering the court after judgment in an action of detinue to make on the application of the plaintiff an order for specific delivery of the property, enforceable by way of execution. This jurisdiction is preserved by the Judicature Act and the Rules of the Supreme Court.⁸¹ The power of the court to order the specific restitution of chattels is discretionary and not a matter of right on the part of the plaintiff. Such an order, therefore, may be either refused altogether, or made only on such terms as to the court seems necessary to do complete justice between the parties.⁸² This being so, it may be assumed that one or other of these courses will be adopted in all cases in which the value of the chattel exceeds the amount of damages to which the plaintiff is entitled. Again when the chattel is an ordinary article of commerce of no special value or interest and not alleged to be of any special value to the plaintiff, and damages will fully compensate, the court will not order specific restitution.⁸³ If the defendant has, since taking the property, increased the value of it by his own labour or expenditure, the plaintiff is entitled to recover as damages only its original and not its present value.⁸⁴ This being so, it is clear that if the plaintiff seeks specific restitution instead of damages the court must either refuse this remedy altogether or grant it only on the terms that

⁷⁹ *Capital Finance Co. Ltd. v. Bray* [1964] 1 W.L.R. 323.

⁸⁰ Above, § 33.

⁸¹ Ord. 42, r. 6; Ord. 48, r. 1.

⁸² *Peruvian Guano Co. v. Dreyfus Bros.* [1892] A.C. 166, 176.

⁸³ *Whiteley Ltd. v. Hilt* [1918] 2 K.B. 808, 819. If the action is brought in contract, the court has a similar discretion: Sale of Goods Act, 1899, s. 52.

⁸⁴ §§ 214, 215.

the plaintiff shall make to the defendant a fair allowance in respect of the increased value of the property.⁸⁵

Accessio, specificatio, and confusio⁸⁶

It is in this circumstance that specific restitution is a matter of judicial discretion and not of right that we must find the solution in English law of all those puzzles concerning *accessio*, *specificatio*, and *confusio* which we find discussed with such unsatisfactory results in Roman law and the Continental systems founded upon it. *Accessio* is the combination of two chattels belonging to different persons into a single article: as when A's cloth is used to patch B's coat, or a vehicle let on hire-purchase has new accessories fitted to it. *Specificatio* is the making of a new article out of the chattel of one person by the labour of another: as when A's corn is ground into flour by B, or his grapes are made into wine. *Confusio* or *commixtio* is the mixture of things of the same nature but belonging to different owners so that the identification of the things is no longer possible: as when motor-vehicles are "cannibalised," and their parts used to build a new machine. In all these cases there are two distinct questions to be asked. The first, which is of subordinate importance, is: In whom is the ownership of the new article so created? The second is: Who is entitled to the possession of the new article, and on what terms will he be permitted to retain or recover it? As to the first question such authority as we have is mostly of ancient date and shows a tendency to follow the conclusions of Roman law on this matter. It is submitted, however, that these authorities are of little weight at the present day, having regard to the modern development of the law of conversion, and that the true principle of English law is that a man's property in chattels is not divested by any such events. If my corn is wrongfully taken from me and made into flour, the flour is mine; and if my tree is cut down and sawn into timber, the timber is mine.⁸⁷ If my

⁸⁵ *Peruvian Guano Co. v. Dreyfus Bros.* [1892] A.C. 166, 176.

⁸⁶ See Slater, "Accessio, Specificatio, and Confusio" (1957) 37 Can.Bar Rev. 597; Guest, "Accession and Confusion in the Law of Hire-Purchase" (1964) 27 M.L.R. 505.

⁸⁷ Y.B. 5 Hen. 7 (1489), f. 15, pl. 6. But Lindley L.J. thought that if I build a house with another's bricks he can recover from me neither them nor their value: *Gough v. Wood & Co.* [1894] 1 Q.B. 713, 719. So also Blackburn J. in *Appleby v. Myers* (1867) L.R. 2 C.P. 651, 659.

sheep become mixed with another's, so that their identification is impossible, he and I are owners in common of the whole flock in the proportions of our respective contributions to it.⁸⁸

Over and above the question of ownership, however, there arises the question of the right of possession. Here English law avoids all difficulties by making the matter one of judicial discretion unfettered by any general principles. It may be assumed that in all ordinary cases the court will be guided by the relative values of the interests of the rival claimants. Possession will be awarded to him whose interest is the more substantial, on the terms that he pays the value of the other's interest.

Power to order plaintiff to accept restitution instead of damages

When property has once been converted there is a vested right of action in trover which is not divested by the fact that the owner subsequently accepts restitution of the property. Such a recovery of possession goes merely in mitigation of damages and not in bar of the action. Therefore the plaintiff may still commence or proceed with his action for the recovery of such damages as are due in respect of his temporary dispossession.⁸⁹ But is the plaintiff bound to accept such a restitution of converted property; or can he refuse a tender of it, and insist on his right to sue for its value in trover? Under the old practice a tender of the goods was a good plea in an action of detinue, for this action was brought not for damages but for the recovery of the goods themselves.⁹⁰ In trespass and trover, on the contrary, the plaintiff had a good cause of action for the value of the goods and was not bound to accept the goods themselves; and the only remedy of a defendant who was able and willing to restore the property was to apply to the court to exercise its discretionary power of staying the action on delivery of the goods. After some hesitation the courts finally consented to exercise this power in cases in which it was just to the parties that the plaintiff should

⁸⁸ *Gill & Duffus (Liverpool) Ltd. v. Scruttons Ltd.* [1953] 1 W.L.R. 1407. It is said in some cases that if the *confusio* is due to the wrongful act of one of the owners he forfeits his property to the other: *sed quare*: see Guest, 27 M.L.R. 505, 520.

⁸⁹ *Moon v. Raphael* (1835) 2 Bing.N.C. 310.

⁹⁰ *Crossfield v. Such* (1852) 8 Ex. 159.

be thus compelled to accept the property.⁹¹ In other words the courts do not give the plaintiff a right to enforce a sale and so recover the full value of his property. Were the rule otherwise, much hardship might be caused to innocent defendants who have converted in good faith and are entirely willing to restore the property.⁹²

§ 45. Replevin⁹³

Whenever chattels are taken by one person out of the possession⁹⁴ of another, whether by way of distress⁹⁵ or otherwise, the latter may by way of proceedings in replevin recover immediate and provisional possession of them, pending the result of an action brought by him to determine the rights of the parties. The right to replevy goods is a right to get them back at once and provisionally, instead of having first to establish one's title to them in an action of trover, detinue, or trespass. The plaintiff must prove that at the commencement of the action he was the owner or entitled to possession of the chattel in question and that it was at that time being unjustly detained from him.⁹⁶

Replevin is allowable only when the chattels have been taken by a trespass by the defendant out of the plaintiff's possession. It is not available for a mere detention or for any other dispute as to the title or right of possession. The process is based on the presumption that the possessor of goods is the owner of them, and that a seizure of them is illegal, conferring therefore upon the possessor a right to their provisional restoration pending an inquiry into the title.⁹⁷ The right of replevin is usually exercised only in cases of distress, whether for rent, for rates,⁹⁸ damage feasant, or otherwise, though it is legally available

⁹¹ *Tucker v. Wright* (1826) 3 Bing. 601; *U.S.A. v. Dollfus Mieg* [1952] A.C. 582, 619.

⁹² Prosser, *Torts*, p. 98.

⁹³ See Sutton, *Personal Actions*, pp. 66-71.

⁹⁴ So that a bailee can claim: *Swaffer v. Mulcahy* [1994] 1 K.B. 608.

⁹⁵ Wrongful distress is a complex topic. The best short account is in Chapman, *Statutes*, pp. 318-320.

⁹⁶ *MacKensie v. Somers* [1954] 1 D.L.R. 421.

⁹⁷ *Mennie v. Blake* (1856) 6 E. & B. 842. For the relation of the doctrine of trespass *ab initio* to replevin see Williams, "A Strange Offspring of Trespass *ab initio*" (1936) 52 L.Q.R. 106.

⁹⁸ As when a tram-car was seized in *L.C.C. v. Hackney B. C.* [1928] 2 K.B. 588.

for all forms of taking whether under colour of distress or not.⁹⁹ If the plaintiff succeeds in an action of replevin he keeps the property which has been thus provisionally restored to him and has judgment for all damage (for example, annoyance in his trade) resulting from the defendant's seizure of it.¹ If the defendant succeeds, he has judgment for the restitution of the property, or in the alternative (when his claim is one of distress for rent), if he so requests, for payment of the amount claimed by him or (where the claim is one of distress damage feasant), if the plaintiff so requests, for the amount of the damages sustained by him.²

§ 46. Rescous and Pound-Breach

Rescous involves the rescue of distrained goods before they reach the pound; pound-breach arises after they have been impounded. Once goods are impounded they are *in custodia legis*, and if a pound has been created it must be respected not merely by the tenant but by strangers as well.³ It is no defence that the defendant did not know that the goods were impounded. In order to constitute the offence of pound-breaking there must, however, be either pound-breaking in fact or some act knowingly done to assist somebody else to commit a pound-breach. He who innocently takes away the goods after the pound-breach has been completed and the goods are out of the pound is not liable.⁴

⁹⁹ *Shannon v. Shannon* (1804) 1 Sch. & Lef. 324; County Court Rules, 1936, O. 38, r. 3.

¹ *Smith v. Enright* (1898) 69 L.T. 724.

² County Court Rules, 1936, O. 38, rr. 1-3.

³ *Lavell & Co. v. O'Leary* [1933] 2 K.B. 200, in which most of the law on this topic is discussed.

INJURIES TO REVERSIONARY INTERESTS

§ 47. Injuries to Reversionary Interests in Land

TRESPASS and nuisance are essentially injuries to the possession of land and not to the ownership of it. We will now, therefore, consider the position of a reversioner—using that term in a wide sense to include any person having a lawful interest in land but not the present possession of it—*e.g.*, a landlord whose land is in the occupation of a tenant. Injuries to reversionary interests are of two kinds, according as they are committed (1) by the tenant or other person in possession of the land, or (2) by a stranger. Injuries of the first kind may be included under the generic title of waste, which may be defined as unlawful damage done or permitted by the occupier of land as against those having reversionary interests in it. An account of the law of waste does not pertain to the law of torts but is a branch of the law of property.¹ It is otherwise with the second class of injuries to reversionary interests—*viz.*, those which are committed not by the occupier, but by strangers. These injuries are governed by general principles which properly pertain to the law of torts. The question is this: In what circumstances will an action lie at the suit of a reversioner for an act done in respect of the land by a stranger who is not in possession of it?

A reversioner may sue for any trespass or nuisance if, and only if, it actually affects his reversionary interest; and in general this is so only if the effects of the injuries so committed are permanent. Temporary consequences give a cause of action only to the occupier; permanent consequences give a cause of action both to him and to the reversioner. Consequences are permanent in this sense if they are of such a nature that they will continue to affect the land even after the interest

¹ As regards the reversioner, the law treats waste as breach of a contractual obligation, although voluntary waste is also the subject-matter of an action of tort.

of the reversioner has become an interest in possession.² Accordingly a mere trespass, unaccompanied by any physical injury to the land, is not actionable at the suit of a reversioner, even though committed under a claim to a right of way³; neither is a temporary nuisance, such as noise or smoke, which causes no enduring physical harm to the property.⁴ It is otherwise, however, if permanent physical harm is done, whether by way of trespass, nuisance, or otherwise.⁵ In applying this rule we must be careful not to confound a permanent injury with a continuing one. A permanent injury is a completed wrong the consequences of which will endure until the interest of the reversioner has fallen into possession, and for which accordingly he has a present right of action—e.g., the destruction of a building on land in the possession of the plaintiff's tenant. A continuing injury, on the other hand, is one which is still in process of being committed—e.g., a nuisance caused by the smoke or noise of a factory. We shall see⁶ that even the occupier himself cannot recover damages for the future continuance of such a continuing injury, howsoever probable that continuance may be.⁷ He recovers damages only for the past; and if the wrong continues he may sue a second time on a new cause of action thus arising. So the reversioner *a fortiori* must wait until his interest falls into possession, and then, if the injury still continues, he will have his action. But a reversioner may sue for any continuing injury which, by virtue of the law relating to prescription, will by its continuance prejudicially affect his reversionary interest in the land by creating or destroying a servitude in relation thereto. On this principle it has been repeatedly decided that a reversioner may sue for an obstruction to ancient lights or for interference with a right of way.⁸

² *Shelfer v. City of London Electric Lighting Co.* [1895] 1 Ch. 287, 318.

³ *Cooper v. Crabtree* (1882) 20 Ch.D. 589.

⁴ *Jones v. Chappell* (1875) 20 Eq. 539; *Mott v. Shoolbred* (1875) 20 Eq. 22.

⁵ *Jones v. Llanrwst Urban Council* [1911] 1 Ch. 393, 404 ("the sewage of Llanrwst will continue to be turned into the Conway unless and until something is done to divert it elsewhere").

⁶ Below, § 222.

⁷ Save when damages are awarded in substitution for an injunction as the price of the legalisation of future continuance.

⁸ *Metropolitan Association v. Petch* (1858) 5 C.B.(N.S.) 504.

§ 48. Injuries to Reversionary Interests in Chattels

We have already seen⁹ that a person not in actual possession and not entitled to immediate possession could not sue in conversion, even though he was the owner of the property. Thus no action of conversion would lie at the suit of a bailor of goods for a fixed term,¹⁰ as distinct from a bailor at will¹¹; or at that of a purchaser of goods which were still held by the vendor under his lien.¹² A similar rule limited the application of the action of detinue¹³ and of trespass *de bonis asportatis*.¹⁴ In all such cases the remedy of the plaintiff was not conversion but a special action on the case for the injury done to his reversionary interest. There seems to be no particular reason why this specific action on the case should now be retained separate from the tort of conversion.¹⁵

Although a plaintiff entitled to immediate possession has a right of action in every case in which a conversion or trespass has been committed, a reversioner cannot sue unless by reason of the conversion or trespass he has been actually deprived, permanently or temporarily, of the benefit of his reversionary interest.¹⁶ Thus, he can sue if the chattel has been destroyed, or if it has been so disposed of that a valid title to it has become vested in a third person, as by sale in market overt. So also he can sue if, after his reversionary interest has fallen into possession, he is prevented from obtaining possession by reason of the previous act of conversion. But while his interest remains reversionary he cannot sue merely because the chattel has been wrongfully taken or detained from him who is entitled to the immediate possession of it. For *non constat* that his reversionary interest will be in any way affected. We have seen¹⁷ that a possessory title continues although the possessory owner has delivered possession to some other person who holds

⁹ Above, § 40.

¹⁰ *Gordon v. Harper* (1796) 7 T.R. 9.

¹¹ *Manders v. Williams* (1849) 4 Ex. 339.

¹² *Lord v. Price* (1874) L.R. 9 Ex. 54.

¹³ *Nyberg v. Handelaar* [1892] 2 Q.B. 202.

¹⁴ *Ward v. Macauley* (1791) 4 T.R. 489.

¹⁵ Salmond, "Observations on Trover and Conversion" (1905) 21 L.Q.R. 43, 54; Prosser, *Torts*, p. 69.

¹⁶ *Halliday v. Holgate* (1868) L.R. 3 Ex. 299, 302; *Penfold's Wines Pty. Ltd. v. Elliott* (1946) 74 C.L.R. 204, 230-231.

¹⁷ Above, § 40.

the property on his behalf returnable at will. What shall be said if the possessory owner, instead of merely bailing the goods at will, pledges them or bails them for a fixed term, or otherwise parts with the right to the immediate possession of them: is his possessory title thus destroyed, or does it still subsist as a reversionary interest capable of protection by action against third persons? This has never been decided, but it is submitted that there is no reason for any such distinction between a bailment at will and one for a term and that a possessory title may become reversionary and yet subsist just as a legal title may. If this is so, a possessory owner who pledges the property or bails it for a term has not merely a title by estoppel against his own pledgee or bailee, but a title valid against all persons except the true owner. The rule that the full value of the property can be recovered even by a plaintiff with a limited interest does not extend to a plaintiff suing in respect of some reversionary interest or right of future possession.

TRESPASS TO THE PERSON

§ 49. Battery

THE application of force to the person of another without lawful justification amounts to the wrong of battery.¹ This is so, however trivial the amount or nature of the force may be, and even though it neither does nor is intended nor is likely or able to do any manner of harm. Even to touch a person without his consent or some other lawful reason is actionable.² Nor is anger or hostility essential to liability: an unwanted kiss may be a battery. For the interest that is protected by the law of assault and battery is not merely that of freedom from bodily harm, but also that of freedom from such forms of insult as may be due to interference with his person. In respect of his personal dignity, therefore, a man may recover substantial damages for battery which has done him no physical harm whatever,³ as when a man's finger-prints are taken without observing the statutory⁴ requirements.⁵

On the other hand, consent is implied to such physical contacts as are a reasonably necessary consequence of social life. A defence is therefore available for "the jostler, the back-slapper, and the hand-shaker."⁶

Assault and Battery

Intentionally to bring any material object into contact with another's person is a sufficient application of force to constitute a battery; for example, to throw water upon him,⁷ or to pull

¹ This definition was cited with approval by Ilsey C.J. in *Eisner v. Maxwell* [1951] 1 D.L.R. 816, 823.

² *Cole v. Turner* (1704) 6 Mod. 149; but not for him to invite you to touch him in an indecent manner: *D.P.P. v. Rogers* [1953] 1 W.L.R. 1017 (though it may be a criminal offence: Indecency with Children Act, 1960). Cf. *Coward v. Baddeley* (1859) 4 H. & N. 478.

³ This sentence was cited with approval in *Stewart v. Stonehouse* (1926) 2 D.L.R. 688, 684.

⁴ Magistrates' Courts Act, 1952, s. 40.

⁵ But see *Callis v. Gunn* [1964] 1 Q.B. 495.

⁶ Lord Devlin, *Samples of Lawmaking* (1962), p. 85.

⁷ *Pursell v. Horn* (1888) 8 A. & E. 602.

a chair from under him whereby he falls to the ground,⁸ or to apply a "tone-rinse" to his scalp.⁹ So it is a battery forcibly to take from him some object which he holds¹⁰ or wears.¹¹ It is also probably a battery to project heat, light, noise, or vapours onto another person in such a manner as to cause physical injury or personal discomfort.¹² It is a disputed question how far the term "battery" was, or is now, confined to cases of wilful or intentional injuries. As the line of division between trespass and case depended on whether the damage was direct or indirect and not on whether it was intentional or negligent,¹³ a long series of cases affirmed that a battery did not necessarily involve intention.¹⁴ It was also quite clear that a person could be guilty of an assault without being guilty of a battery.¹⁵ On the other hand, in popular speech "assault" includes a battery, and Salmond himself¹⁶ thought that the legal and the popular terminology should coincide. His view has been greatly strengthened by *Fowler v. Lanning*,¹⁷ in which it was held that in an action of trespass to the person intention or negligence must be shown. But the status of this decision is still somewhat doubtful,¹⁸ and until it has been definitely approved on appeal it is better to adhere to the traditional common law.

Assault

The act of putting another person in reasonable fear or apprehension¹⁹ of an immediate battery by means of an act amounting to an attempt or threat to commit a battery amounts to an actionable assault.²⁰ Mere words do not constitute an

⁸ *Hopper v. Reeve* (1817) 7 Taunt. 698.

⁹ *Nash v. Sheen* [1953] C.L.Y. 3726 (Hilbery J.).

¹⁰ *Green v. Goddard* (1704) 2 Salk. 640.

¹¹ *Humphreys v. Connor* (1864) 17 Ir.C.L.R. 1 (Orange lily).

¹² Winfield, *Tort*, p. 151.

¹³ See above, § 2.

¹⁴ *Covell v. Laming* (1808) 1 Camp. 497; *Eisener v. Maxwell* [1951] 1 D.L.R. 816, 827 (approving the views of Stallybrass in earlier editions), reversed, [1951] 3 D.L.R. 345; *Mantey v. Spanks* [1952] 3 D.L.R. 789.

¹⁵ *Jones v. Sherwood* [1942] 1 K.B. 127.

¹⁶ 6th ed., s. 117.

¹⁷ [1959] 1 Q.B. 426. See below § 52.

¹⁸ It was approved, obiter, by the C.A. in *Letang v. Cooper* [1964] 3 W.L.R. 578.

¹⁹ Fear in the sense of alarm is not an essential ingredient of the tort; Winfield, *Tort*, p. 153.

²⁰ *Stephens v. Myers* (1890) 4 C. & P. 349.

assault, however insulting or even menacing²¹; the intent to do violence must be expressed in threatening acts, not merely in threatening speech.²² But words accompanying an act may render harmless what might otherwise be an assault.²³ Even threatening acts do not constitute an assault unless they are of such a nature as to put the plaintiff in fear of immediate violence. To shake one's fist in a man's face is an assault; to shake it at a man who by his distance from the scene of action is inaccessible to such violence is none.²⁴

There need be no actual intention or power to use violence, for it is enough if the plaintiff on reasonable grounds believes that he is in danger of it. Thus it is actionable to point a gun at a man in a threatening manner, even though to the knowledge of the defendant, but not to that of the plaintiff, it is unloaded.²⁵ But if there is no reasonable fear there is no assault: as, for example, when a gun is pointed at a man behind his back.²⁶ Mere passive obstruction does not constitute an assault,²⁷ although if the plaintiff is thereby hindered from going about his lawful occasions he may use reasonable force by way of self-help.²⁸

Criminal Law

An assault is not merely a tort, but also a criminal offence, and the civil and criminal remedies are in general concurrent and cumulative. It is provided, however, by the Offences against the Person Act, 1861, s. 44, that summary criminal proceedings, whether they result in a conviction or an acquittal (after an actual hearing on the merits), are a bar to any subsequent civil proceedings for the same cause.

²¹ They may be actionable on other grounds: below, § 54.

²² *Meade's and Belt's Case* (1823) 1 Lew. 184. "For Meade's case proves, or my Report's in fault, that singing can't be reckoned an assault": Adolphus, "The Circuiteers" (1884) 1 L.Q.R. 232. But see *R. v. Wilson* [1955] 1 W.L.R. 493, 494.

²³ *Tuberville v. Savage* (1669) 1 Mod. 3.

²⁴ *Stephens v. Myers* (1890) 4 C. & P. 349.

²⁵ *R. v. St. George* (1840) 9 C. & P. 488, 493. See Turner, "Assault at Common Law," *Modern Approach to Criminal Law*, p. 344.

²⁶ *Osborn v. Veitch* (1858) 1 F. & F. 817.

²⁷ *Innes v. Wylie* (1844) 1 C. & K. 257 (defendant "like a door or wall").

²⁸ See below, § 52.

§ 50. False Imprisonment

The wrong of false ²⁹ imprisonment consists in the act of arresting or imprisoning any person without lawful justification, or otherwise preventing him without lawful justification from exercising his right of leaving the place in which he is. It may also be committed by continuing a lawful imprisonment longer than is justifiable,³⁰ or by imprisoning a person in an unauthorised place.³¹ As it is derived from the action of trespass there is no need to prove actual damage. In any event, when the liberty of the subject is at stake questions as to the damage sustained become of little importance.³² The wrong of false imprisonment is in most cases that of assault also, but not necessarily so; locking a man up in a room in which he already is by his own act amounts to false imprisonment but is no assault. Even if the plaintiff fails to prove some of the ingredients of this tort he may have a special action on the case for the infringement of his liberty,³³ or an action for defamation, malicious prosecution, or the intentional infliction of mental distress. He can also recover his liberty by a writ of habeas corpus.

The Imprisonment

To constitute the wrong in question there need be no actual imprisonment in the ordinary sense—i.e., incarceration. It is enough that the plaintiff has been in any manner wrongfully deprived of his personal liberty. A mere unlawful arrest, for example, amounts in itself to false imprisonment, and so does any act whereby a man is unlawfully prevented from leaving the place in which he is: for example, a house ³⁴ or a motor-car,³⁵ or a ski-lift.³⁶ The taking possession or control of the person, even without actual contact, seems to be the governing

²⁹ The term false is here used not in the ordinary sense of mendacious or fallacious, but in the less common though well-established sense of erroneous or wrong; as in the phrases false quantity, false step, false taste, etc.

³⁰ *Mee v. Cruikshank* (1902) 86 L.T. 708.

³¹ *Cobbett v. Grey* (1849-50) 4 Ex. 729.

³² *John Lewis & Co. v. Tims* [1952] A.C. 676, 680.

³³ *Wright v. Wilson* (1699) 1 Ld.Raym. 739; *Bird v. Jones* (1845) 7 Q.B. 742, 752.

³⁴ *Warner v. Riddiford* (1858) 4 C.B.(N.S.) 180.

³⁵ *Burton v. Davies*, 1953 St.R.Qd. 26.

³⁶ *The Times*, June 26, 1963.

factor.³⁷ Hence it is unnecessary that there should be any actual use of force. A threat of force, whereby the submission of the person threatened is procured, is sufficient: for example, showing a man a warrant for his arrest and thereby obtaining his submission is itself an arrest if it amounts to a tacit threat to execute the warrant by force if necessary; otherwise if it amounts merely to a request with no threat or intent to use force.³⁸ It is enough if the plaintiff shows that he has submitted to restraint because of moral pressure exerted by the defendant, e.g., if the plaintiff goes to answer a charge in order to avoid an embarrassing scene in a public place.³⁹

What is the position if a police officer invites a suspect against whom no charge has yet been made⁴⁰ to accompany him to the police station for an interview? The law draws a very sensible distinction between one who goes to the police station voluntarily in the first instance⁴¹ and one who, having had a charge made against him, goes voluntarily to meet it.⁴² The distinction has been criticised,⁴³ but the common law has never encouraged notions such as "preventive custody," which are familiar elsewhere.⁴⁴ It has even been said in the Court of Appeal in *Meering v. Grahame-White Aviation Co.*⁴⁵ that a man may be imprisoned without knowing it. "A person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is a lunatic. So a man might in fact, to my mind, be imprisoned by having the key of a door turned against him so that he is imprisoned in a room in fact although he does not know that the key has been turned."⁴⁶

³⁷ *Grainger v. Hill* (1888) 4 Bing.N.C. 212; *Conn v. David Spencer Ltd.* [1930] 1 D.L.R. 805, 807.

³⁸ *Warner v. Riddiford* (1858) 4 C.B.(N.S.) 180. *Semble*, the signing of the charge-sheet is sufficient to constitute false imprisonment: *Clubb v. Wimpey* [1936] 3 All E.R. 148. *Contra*, *Sewell v. National Telephone Co.* [1907] 1 K.B. 557.

³⁹ *Clayton v. London etc. Fashions Ltd.* (1961) 31 D.L.R. (2d) 527.

⁴⁰ "A person who, it is believed, may be able to assist the police in their inquiries," to use the genteel euphemism common in police announcements.

⁴¹ This is not so unlikely as might appear at first sight; a man often prefers to answer police inquiries at the station rather than at home within sight of curious neighbours.

⁴² *Peters v. Stanway* (1885) 6 C. & P. 737. Such a person can sue.

⁴³ *Williams*, [1960] Crim.L.R. 325-327.

⁴⁴ See below, § 52.

⁴⁵ (1919) 122 L.T. 44 (Duke L.J. dissenting).

⁴⁶ *Meering v. Grahame-White Aviation Co.* (1919) 122 L.T. 44, at 53, per Atkin L.J., who made the point that the plaintiff's captors might be

To constitute imprisonment the deprivation of the plaintiff's liberty must be complete—that is to say, there must be on every side of him a boundary drawn beyond which he cannot pass. It is no imprisonment to prevent him from going in some directions while he is left free to go as far as he pleases in others. Thus no action for false imprisonment⁴⁷ will lie for unlawfully preventing the plaintiff from going along one part of the highway and compelling him to go back.⁴⁸ But the means of escape available must be such as are reasonable in all the circumstances of the case. Probably the means of escape are unreasonable if they involve exposure of the person,⁴⁹ or material harm to the clothing, or damage to the person (as distinct from a mere trespass against the property⁵⁰) of another.⁵¹

*Failure to afford facilities for leaving premises*⁵²

Towards persons who are upon his premises and who are unable to leave them unless active measures are taken by him in that behalf, an occupier owes no duty to take such measures. If he fails or refuses to do so he is not liable to an action of false imprisonment. If my neighbour falls down a pit upon my land I am under no obligation to pull him out. In *Herd v. Weardale Steel Coke and Coal Co.*⁵³ certain miners, having been lowered down the defendants' mine, wrongfully refused to continue their work, and demanded that they should at once be taken to the surface. The defendants, however, refused to do so, and stopped the working of the cage, by reason of which the miners were compelled to remain for some little time in the mine against their will. In an action for false imprisonment it was held by the House of Lords that it was a case of *volenti non fit injuria*. Even

boasting elsewhere of the imprisonment: but would not this be defamation? Winfield, *Tort*, p. 156. This case has been criticised by Goodhart, "Restatement of the Law of Torts" (1935) 83 U.Pa.L.Rev. 411, 418, and is inconsistent with *Herring v. Boyle* (1884) 1 C.M. & R. 377, but is supported by Prosser "False Imprisonment: Consciousness of Confinement" (1955) 55 Col.L.Rev. 847.

⁴⁷ But an action may lie for assault or intimidation.

⁴⁸ *Bird v. Jones* (1845) 7 Q.B. 742.

⁴⁹ As where the plaintiff is bathing and the defendant removes his clothes.

⁵⁰ So ruled by Sir John Holt C.J. at Nisi Prius: *Wright v. Wilson* (1699) 1 Ld.Raym. 693.

⁵¹ *Restatement*, s. 36.

⁵² Amos, "Contractual Restraint of Liberty" (1928) 44 L.Q.R. 464.

⁵³ [1915] A.C. 67.

if the motive was to punish the plaintiffs,⁵⁴ there was no cause of action, though it might have been otherwise if it had been a case of sudden illness.

In *Herd's* case there was no breach of contract by the defendants. Where the detention is in breach of a contract between the parties, it may be a question whether the detention amounts to the tort of false imprisonment or merely to a breach of contract.⁵⁵ In *Herd's* case in the Court of Appeal, the opinion was expressed by Buckley L.J., and Hamilton L.J., that the injury in such a case was a breach of contract only.⁵⁶ This, however, may be a matter of some doubt. The case may be one of those in which the defendant, by making a contract, places himself in such a position that he cannot break it without also committing a tort. A surgeon who commences an operation and then refuses or neglects to complete it is clearly liable in tort as well as in contract for any injury so inflicted on his patient, though he was under no duty apart from his contract to perform the operation at all. So if a mining company takes a miner down the shaft, and in breach of contract refuses to bring him up again, it may well be that on the same principle the resulting imprisonment of the plaintiff is an actionable tort. The question is of practical importance for the reason, *inter alia*, that it is only in an action of tort that aggravated damages are recoverable.

§ 51. False Imprisonment Distinguished from Malicious Prosecution and Abuse of Process

No action for false imprisonment will lie against a person who has procured the imprisonment of another by obtaining against him a judgment or other judicial order of a court of justice, even though that judgment or order is erroneous, irregular, or without jurisdiction. The proper remedy for wrongfully procuring the judicial imprisonment of the plaintiff is an action for malicious prosecution or other malicious abuse of legal

⁵⁴ As in *Burns v. Johnston* [1917] 2 I.R. 187.

⁵⁵ Salmond suggested (6th ed., p. 442) that there were other cases than breach of contract in which the facts might impose on the defendant a positive legal obligation to take active measures for the plaintiff's release. Perhaps he was thinking of sudden illness.

⁵⁶ [1918] 8 K.B. 771, 789, 793.

process, the nature of which we shall have to consider in a subsequent chapter. We shall there see that in an action of that description the plaintiff can succeed only if he proves both malice and the absence of any reasonable and probable cause for the proceedings complained of; whereas in an action for false imprisonment, just as in all other cases of trespass to person or property, liability is created, in general, even by honest and inevitable mistake.⁵⁷ The rule, therefore, that no action for false imprisonment will lie against a litigant in respect of judicial imprisonment procured by him is a valuable protection against liability for error in the course of legal proceedings.

Court not agent of litigant

Thus in *Austin v. Dowling*⁵⁸ it was said by Willes J.: "The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon a magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment." Accordingly, if the plaintiff has been wrongly arrested without warrant and taken before a magistrate, who remands him in custody, he must sue in respect of his imprisonment before the remand in an action for false imprisonment, but in respect of that which is subsequent to the remand in an action for malicious prosecution.⁵⁹ The reason for this distinction is that a man cannot be sued in trespass (and so not for false imprisonment) unless he himself, whether personally or by his agent, has done the act complained of. A court of justice, however, is not the agent of the litigant but acts in the exercise of its own independent judicial discretion. The litigant can be charged only with having maliciously and without reasonable cause exercised his right of setting a court of justice in motion.⁶⁰ This exemption of the

⁵⁷ See Sutton, *Personal Actions*, p. 61.

⁵⁸ (1870) L.R. 5 C.P. 534, at 540.

⁵⁹ *Lock v. Ashton* (1848) 12 Q.B. 871.

⁶⁰ See *Brown v. Chapman* (1848) 6 C.B. 365; *Lea v. Charrington* (1889) 23 Q.B.D. 46, 272.

litigant from any liability for false imprisonment extends even to cases in which the court ordering the imprisonment has acted without jurisdiction. It is the right of every litigant to bring his case before the court, and it is for the court to know the limits of its own jurisdiction and to keep within them.⁶¹

Ministerial officers

If, however, the litigant, after procuring a judicial order of imprisonment, proceeds to execute it by means of some ministerial officer whom he thereby makes his agent, he may thereby make himself responsible in an action for false imprisonment if the order was one which ought not to have been made.⁶² Whether he will be so responsible or not depends on whether the order is of such a nature as, even though wrongful, to be a protection to those who act in reliance on it. An action for false imprisonment will lie against any person who authorises or directs the unlawful arrest or detention of the plaintiff by a merely ministerial officer of the law. He who sets in motion a merely ministerial officer, such as a constable, has no protection similar to that which is extended to the litigant in a court of justice. If he makes that ministerial officer his agent he is responsible for any arrest or detention so procured or authorised. It is necessary to prove actual direction or authorisation; mere information given to such an officer, on which he acts at his own discretion, is no ground of liability.⁶³

§ 52. Defences to Action of Trespass to the Person

A trespass to the person may be justified ⁶⁴ on the ground (1) that the defendant was acting in self-defence; (2) that the defendant was acting to prevent a trespass or ejecting a trespasser; (3) sometimes that the plaintiff consented to the trespass; (4) that the defendant was acting in support of the criminal law to secure the public peace; (5) that the defendant was administering reasonable chastisement in the exercise of parental or other authority; (6) of inevitable accident. We have

⁶¹ *Brown v. Chapman* (1848) 6 C.B. 365.

⁶² *Painter v. Liverpool Gas Light Co.* (1836) 3 A. & E. 493.

⁶³ *Grinham v. Willey* (1859) 4 H. & N. 496.

⁶⁴ See Beale, "Justification for Injury." (1928) 41 Harv.L.Rev. 553.

already⁶⁵ discussed justification by reason of the consent of the plaintiff.

(1) Self-defence

It is lawful for any person to use a reasonable degree of force for the protection of himself or any other person against any unlawful use of force. In the older books a distinction is drawn between the defence of oneself and of certain persons with whom one is closely connected (such as a wife, child, or master), and the defence of a mere stranger.⁶⁶ It may be safely assumed, however, that at the present day all such distinctions are obsolete and that every man has the right of defending any man by reasonable force against unlawful force.⁶⁷ Still, the relationship of the parties may be relevant to the reasonableness of the force used.

Force is not reasonable if it is either (i) unnecessary—*i.e.*, greater than is requisite for the purpose—or (ii) disproportionate to the evil to be prevented. In order that it may be deemed reasonable within the meaning of this rule, it is not enough that the force was not more than was necessary for the purpose in hand. For even though not more than necessary it may be unreasonably disproportionate to the nature of the evil sought to be avoided. "A man cannot justify a maim for every assault; as if A strike B, B cannot justify the drawing his sword and cutting off his hand; but it must be such an assault whereby in probability the life may be in danger."⁶⁸ One cannot lawfully defend oneself against a trivial assault by inflicting death or grievous bodily harm, even though the assault cannot be prevented in any other way. Still, "If you are attacked with a deadly weapon you can defend yourself with a deadly weapon or with any other weapon which may protect your life. The law does not concern itself with niceties in such matters. If you are attacked by a prize-fighter you are not

⁶⁵ Above, §§ 12-14.

⁶⁶ *Leward v. Baseley* (1695) 1 Ld.Raym. 62.

⁶⁷ This sentence was approved by the Irish C.C.A. in *The People v. Keatley* [1954] I.R. 12, 17, and the law was so laid down in *Goss v. Nicholas* [1960] Tas.S.R. 188.

⁶⁸ *Cook v. Beal* (1697) 1 Ld.Raym. 176, at 177, *per curiam*; *Dale v. Wood* (1822) 7 Moore 33.

bound to adhere to the Queensberry rules in your defence.”⁶⁹ He on whom an assault is threatened or committed is not bound to adopt an attitude of passive defence: “I am not bound to wait until the other has given a blow, for perhaps it will come too late afterwards,” it was said in the *Chaplain of Gray’s Inn’s Case* in 1400.⁷⁰ The defendant will be justified so long as he does not go beyond what is reasonable as a measure of self-defence. Nor need he make any request or give any warning, but may forthwith reply to force by force.⁷¹

(2) Prevention of trespass or ejection of a trespasser

It is lawful for any occupier of land, or for any other person with the authority of the occupier, to use a reasonable degree of force in order to prevent a trespasser from entering⁷² or to control his movements⁷³ or to eject him after entry.⁷⁴ This right of using force against trespassers is conferred only on the occupier of the land (or his agents), for it is only the occupier who is entitled to complain of a trespass and to take legal proceedings in respect thereof. The mere use of property, therefore, without the exclusive possession of it, will not justify the use of force to exclude others.⁷⁵ This right must be distinguished from forcible re-entry upon land of which possession has been wrongfully taken or detained⁷⁶ and from the right of an occupier to justify his acts on the ground of necessity.⁷⁷ Presumably any

⁶⁹ *Turner v. M.-G.-M. Pictures Ltd.* [1950] 1 All E.R. 449, at 471, per Lord Oaksey. For the effect of provocation by abuse, see *Griggs v. Southside Hotel Ltd.* [1946] 4 D.L.R. 73.

⁷⁰ Y.B. 2 Hen. IV, fo. 8, pl. 40.

⁷¹ *Green v. Goddard* (1704) 2 Salk. 641. In 178 H.L. Deb. 421–432 (July 29, 1952) there is a statement by Lord Simonds on the position of a householder in relation to a person who has a statutory right of entry but does not produce a search warrant.

⁷² For the legality of such devices as barbed wire and broken glass, see below, § 112.

⁷³ *Harrison v. Rutland (Duke of)* [1898] 1 Q.B. 142 (trespasser on grouse-moor held down by keepers until the drive was over).

⁷⁴ *Green v. Goddard* (1704) 2 Salk. 641.

⁷⁵ *Dean v. Hogg* (1834) 10 Bing. 345; *Holmes v. Bagge* (1853) 1 E. & B. 782. As against a mere wrongdoer, however, actual possession without title is doubtless sufficient, just as in an action of trespass: *Brett v. Mullarkey* (1873) Ir.Rep. 7 C.L. 120.

⁷⁶ Below, § 230.

⁷⁷ Above, § 15.

person entitled to the possession of a chattel may also defend his possession by the use of reasonable force.⁷⁸

Previous request necessary

A trespasser cannot be forcibly repelled or ejected until he has been requested to leave the premises and a reasonable opportunity of doing so peaceably has been afforded to him.⁷⁹ But as against him who enters or seeks to enter by force, "I need not request him to be gone, but may lay hands on him immediately, for it is but returning violence with violence. So if one comes forcibly and takes away my goods, I may oppose him without any more ado, for there is no time to make a request."⁸⁰ As to the amount of force that may be used the general rule is that it must not exceed that which is indicated in the old forms of pleading by the phrase *molliter manus imposuit*. That is to say, it must amount to nothing more than forcible removal and must not include beating, wounding, or other physical injury. Thus in *Collins v. Renison*⁸¹ the plaintiff sued for the assault of throwing him off a ladder. It was held a bad plea that the plaintiff was trespassing and refused after request to leave the premises and that the defendant thereupon "gently shook the ladder, which was a low ladder, and gently overturned it, and gently threw the plaintiff from it upon the ground, thereby doing as little damage as possible to the plaintiff." Sir Dudley Ryder C.J. held that such force was not justifiable in defence of the possession of land. In any event, as he very sensibly observed, "The overturning of the ladder could not answer the purpose of removing the plaintiff out of the garden; since it only left him upon the ground at the bottom of the ladder, instead of being upon it." Nor may an occupier do indirectly what he is prohibited from doing directly: he cannot eject the trespasser if his removal from the premises would expose him to serious risk of physical injury.⁸²

There are two exceptions to this rule:

- (1) If the trespasser in the course of eviction makes or threatens to make an assault upon the person evicting

⁷⁸ For forcible recaption of chattels, see below, § 281.

⁷⁹ Cf. above, § 29.

⁸⁰ *Green v. Goddard* (1704) 2 Salk. 641, *per curiam*.

⁸¹ (1754) Sayer 138.

⁸² *Depue v. Flateau* (1907) 100 Minn. 299 (sick trespasser turned out into snow).

him, the case becomes one of the defence of the person, and thereafter any force may be used which is reasonable within the rule as to self-defence already considered, even though it involves beating or physical harm.

- (2) If the trespasser enters or seeks to enter by means of a forcible felony the case falls within the rule that any force is justifiable which is necessary to prevent the commission of a felony by force.⁸³

(3) Consent to the trespass

See sections 12-14 above for this topic.

(4) Defendant acting in support of the law

Sometimes an assault or imprisonment may be justified on the ground that the defendant was acting in support of the law. But the courts are anxious to see that the liberty of the subject is not invaded except under due process of law and the onus of proving legal justification lies on the defendant.⁸⁴

So one who relies upon a statutory power of entry for public health⁸⁵ or mental health⁸⁶ purposes must prove that all the statutory conditions precedent to entry have been complied with, or else an assault upon him may be justifiable.

(i) Arrest for breach of the peace

It is the right, and indeed the duty,⁸⁷ of every subject to arrest without warrant any person for a breach of the peace

⁸³ The criminal law on the matter is not as clear as might be wished. In Dicey, *Law of the Constitution*, 8th ed., p. 494 (the passage is not in the current edition), the following remarkable opinion of Willes J. is given as "related by an ear-witness." "The judge was asked: 'If I look into my drawing-room, and see a burglar packing up the clock, and he cannot see me, what ought I to do?' Willes replied, as nearly as may be: 'My advice to you, which I give as a man, as a lawyer, and as an English judge, is as follows: In the supposed circumstances this is what you have a right to do, and I am by no means sure that it is not your duty to do it. Take a double-barrelled gun, carefully load both barrels, and then, without attracting the burglar's attention, aim steadily at his heart and shoot him dead.'" It cannot be supposed that Sir James Shaw Willes meant this to be taken seriously: he may have been answering a fool according to his folly.

⁸⁴ *Christie v. Leachinsky* [1947] A.C. 573. The plea of public interest or act of state is not enough: below, § 175.

⁸⁵ *Stroud v. Bradbury* [1952] 2 All E.R. 76.

⁸⁶ *Townley v. Rushworth* (1963) 62 L.G.R. 95.

⁸⁷ *R. v. Brown* (1841) C. & M. 314. There is no recent example of such a prosecution.

continuing in his presence or if there is a well-founded apprehension of its renewal.⁸⁸ An arrest after the breach of the peace is over is in general unjustifiable: a warrant should be obtained. A breach of the peace takes place when either an assault is committed on an individual or public alarm and excitement is caused. Mere annoyance or insult is not enough⁸⁹: thus at common law a householder could not give a man into custody for violently and persistently ringing his door-bell.⁹⁰ It is the particular duty of a magistrate or police officer to preserve the peace unbroken; hence if he has reasonable cause to believe that a breach of the peace is imminent he may be justified in committing an assault⁹¹ or effecting an arrest.⁹² But there is no power to arrest and detain a person merely because it is apprehended that he may be in danger at some time in the future.⁹³ "If that were so, the adventurous spirits that sought the North Pole, or the interior of Africa, or that conquered the Atlantic in flight, might have been locked up for their own good. Nor does the fact that the supposed danger arises from the designs of wicked men warrant interference with the wish of him who desires to brave it. If it were otherwise, every informer in Irish history could have been locked up for life."⁹⁴ If civil commotion of such a degree as to amount to the offence of unlawful assembly or riot should occur, there is a duty imposed upon all subjects of the Crown to use such force (amounting even to the taking of life) as may be proper and reasonable to restore order.⁹⁵

(ii) Arrest for felony

It is the right and duty of a constable,⁹⁶ or even a private person,⁹⁷ to arrest any person about to commit a felony or

⁸⁸ *Timothy v. Simpson* (1835) 1 Cr.M. & R. 757. On the whole subject see Williams, "Arrest for Breach of the Peace" [1954] Crim.L.R. 578.

⁸⁹ *Bryan v. Robinson* [1960] 1 W.L.R. 506 (smiling and beckoning by Soho

⁹⁰ *Grant v. Moser* (1848) 5 M. & G. 128. This is now an offence under the Town Police Clauses Act, 1847.

⁹¹ *Humphreys v. Connor* (1864) 17 Ir.C.L.R. 1 (removal of Orange lily from Protestant lady); *Coyne v. Tweedy* [1898] 2 I.R. 167.

⁹² *Duncan v. Jones* [1936] 1 K.B. 218. It has been said that even a private person may arrest in such circumstances: *R. v. Light* (1857) 27 L.J.M.C. 1, 8.

⁹³ *Connors v. Pearson* [1921] 2 I.R. 51.

⁹⁴ *Ibid.* at 91, per O'Connor L.J.

⁹⁵ Many authorities are reviewed in *Lynch v. Fitzgerald* [1938] I.R. 382.

⁹⁶ *Coupey v. Henley* (1797) 2 Esp. 540.

⁹⁷ *Handcock v. Baker* (1800) 2 B. & P. 260.

treason or any act endangering life. The question of reasonable and probable cause is, as in the analogous case of malicious prosecution, a question for the judge and not for the jury.⁹⁸ But unlike the case of malicious prosecution it is not necessary for liability that the arrest should have been malicious; it is enough that it was without reasonable and probable cause. The burden of proving the existence of reasonable and probable cause is on the defendant.⁹⁹ There is a curious distinction between arrest by a private person and arrest by a constable or other peace officer. A private person justifying an arrest for a suspected felony must prove that the felony has actually been committed, whether by the person arrested or someone else, and if in fact no felony has been committed it is no defence that there was reasonable and probable cause for believing the person arrested to be guilty. On the other hand, it is enough for the constable to show that there was reasonable and probable cause for suspicion even though no felony had in fact been committed.¹

There is an analogy with the power of a bailiff who enters the house of a stranger to execute civil process: if the goods or person sought be there, he is justified: if not, he is a trespasser.²

Treatment of arrested person. As the common law is always solicitous for the freedom of the individual, the subject who is arrested is entitled to know the reason for his arrest so that he may know at once whether he is bound to submit. The constable is not entitled to keep the reason to himself or give a reason which is not the true one: if he does so he will in general be liable for false imprisonment.³ These rules must be interpreted in a reasonable manner. Thus explanation is unnecessary "if the

⁹⁸ *Dallison v. Caffery* [1964] 3 W.L.R. 385. As to what is a reasonable and probable cause, see *McArdle v. Egan* (1933) 150 L.T. 412.

⁹⁹ *Hicks v. Faulkner* (1878) 8 Q.B.D. 167, 170. *Aliter* in actions for malicious prosecution.

¹ *Walters v. W. H. Smith & Sons* [1914] 1 K.B. 595; *Christie v. Leachinsky* [1947] A.C. 573. As Lord du Parc remarked in the latter case (at p. 602), this is one of the few privileges which the common law confers on the police constable, "who may be described as a private person paid to perform as a matter of duty acts which, if so minded, he might have done voluntarily"—Stephen, *Hist.Cr.Law*, i, 494. See the comment on this in Hart, *The British Police* (London, 1952), pp. 12-13. See also Williams, "Arrest for Felony at Common Law" [1954] *Crim.L.R.* 408.

² *Southam v. Smout* [1964] 1 Q.B. 308.

³ *Christie v. Leachinsky* [1947] A.C. 573.

arrested man is caught red-handed and the crime is patent to high heaven.”⁴ Nor is it necessary for any precise or technical language to be used. It is enough if the substance of the matter is conveyed to the person arrested. The constable must do the best he can in the circumstances and if it is what a reasonable man would have done he will be protected: if he is arresting a deaf person he is not bound to use a speaking-trumpet or shout at the top of his voice.⁵ It is irrelevant that the offence is apparently trivial or the person arrested of doubtful character, for “In the matter of a trespass to the person a petty impertinence is not beneath the notice of the law, just as a dignified insolence is not above it. . . . The transgressor of the law while disobeying it can still rely on the law and assert the law’s supremacy.”⁶

The law requires that a person arrested on suspicion of felony should be brought before a magistrate (or possibly handed over to a police officer) not necessarily immediately or by the most direct route but within a reasonable time. Thus in *John Lewis & Co. v. Tims*⁷ a regulation of the appellants’ department store provided that only a managing director or general manager was authorised to institute a prosecution. The respondent, having been arrested by the appellants’ servants on suspicion of larceny, was accordingly brought back to the office and detained there for a short time while the necessary authority was obtained. The House of Lords refused to accept the contention that the defendants were guilty of false imprisonment because the plaintiff had not been taken before a magistrate or to the police station forthwith. “There are advantages in refusing to give private detectives a free hand and leaving the determination of whether to prosecute or not to a superior official.”⁸ On the other hand, a police officer has been held to be justified in taking the arrested person elsewhere (*e.g.*, to his home or place of work) for the purpose of obtaining further

⁴ *Ibid.*, at 598, *per* Lord Simonds.

⁵ *Tims v. John Lewis & Co.* [1951] 2 K.B. 459, 467.

⁶ *Leachinsky v. Christie* [1946] 1 K.B. 124, at 150–152, *per* Uthwatt J., followed in *The People v. White* [1947] I.R. 247. These rules apply to arrest by a private person as well as by a constable: [1947] A.C. at 588.

⁷ [1952] A.C. 676.

⁸ *Ibid.*, at 691, *per* Lord Porter.

evidence, whether incriminatory or exculpatory.⁹ This is probably justifiable on the ground that what is reasonable in a police officer may not be reasonable in a private arrester.

(iii) *Arrest for misdemeanour*

Except in the case of a breach of the peace there is no power at common law to arrest without warrant on suspicion of a misdemeanour.¹⁰ But statutes have given very extensive powers of arrest in such circumstances.¹¹ What is the position if the constable honestly and on reasonable grounds believed that the person he has arrested has committed such an offence when in fact he has not? In *Barnard v. Gorman*¹² the House of Lords refused to lay down any general principle, stating that the matter depended on the construction of the particular statute, but the balance of authority favours the view that an honest suspicion founded on reasonable grounds is a defence. The present position is unsatisfactory, for as Winfield remarked, "The law as it now stands certainly casts a heavy responsibility on a constable who may have to decide at a moment's notice a point that has puzzled the appellate courts several times."¹³

Finally, a private individual is entitled to arrest a person who has escaped from lawful custody and also to act in aid of officers of the law acting justifiably.¹⁴ He may also in an emergency arrest a person so disordered in his mind as to be a danger to himself or others, but only a very temporary confinement can be justified unless the provisions of the Mental Health Act, 1959, ss. 25-31, are complied with.¹⁵

(5) *Parental and other authority*

A father has a right to the custody and control of his children until they are twenty-one, and whilst he has such control he may beat or imprison them by way of punishment so long as he acts reasonably.¹⁶ When a father sends his child to school he

⁹ *Dallison v. Caffery* [1965] 1 Q.B. 349.

¹⁰ *Gelberg v. Miller* [1961] 1 W.L.R. 153.

¹¹ Details in *Index to the Statutes in Force, s.v.* "Arrest."

¹² [1941] A.C. 378.

¹³ *Tort*, p. 160. See also Williams, "Demanding Name and Address" (1950) 66 L.Q.R. 465; *Wiltshire v. Barrett* [1965] 2 W.L.R. 1195.

¹⁴ Clerk and Lindsell, *Torts*, §§ 605-606.

¹⁵ *Townley v. Rushworth* (1963) 62 L.G.R. 95.

¹⁶ *Att.-Gen. v. Edge* [1943] I.R. 115. The right is recognised by s. 1 (7) of the Children and Young Persons Act, 1933.

delegates to the schoolmaster all his own authority, so far as is necessary for the welfare of the child,¹⁷ and a schoolmaster therefore is entitled to administer reasonable chastisement to the child,¹⁸ or to expel him for reasonable cause.¹⁹ The schoolmaster's authority is not confined to the four walls of the school: in *R. v. Newport (Salop) JJ.*²⁰ it was held that a schoolmaster was justified in administering five strokes of a cane to a boy under sixteen who had, contrary to the rules, been smoking in the street during term after having returned home.

Similarly the master of a vessel at sea is justified in arresting and imprisoning for a reasonable time and in a reasonable manner any sailor or other person on board if he has reasonable cause to believe (and does in fact believe) that the arrest or imprisonment is necessary for the preservation of order on the ship or the safety of one or more of its passengers.²¹ Nor is it an assault for prison officials to take reasonable steps to preserve the health of those in custody—*e.g.*, by forcible feeding.²²

(6) Inevitable accident

It seems that inevitable accident provides a good excuse for a *prima facie* trespass which is otherwise actionable. This may be said to be the generally accepted view since the decision of Denman J. in *Stanley v. Powell*.²³ In that case the defendant whilst firing at a pheasant accidentally and without negligence shot the plaintiff, who was employed to carry cartridges for a shooting party, with a pellet which ricocheted from a tree at a

¹⁷ *Fitzgerald v. Northcote* (1865) 4 F. & F. 656, 689. Prosser, *Torts*, p. 113 offers a better reason.

¹⁸ *Ryan v. Fildes* [1938] 3 All E.R. 517.

¹⁹ *Fitzgerald v. Northcote* (1865) 4 F. & F. 656 (in which the successful plaintiff was the son of Fitzgerald J. of the Irish King's Bench).

²⁰ [1929] 2 K.B. 416.

²¹ *Hook v. Cunard Steamship Co. Ltd.* [1953] 1 W.L.R. 682. Probably this principle also protects the captain of an aircraft.

²² *Leigh v. Gladstone* (1909) 26 T.L.R. 139.

²³ [1891] 1 Q.B. 86. For criticisms of this case, see Landon's vigorous onslaught in Pollock, *Torts*, pp. 128–134 (of *National Coal Board v. Evans* he says (at 128): "all one can do is to wring one's hands and to note this recent case as a striking illustration of the old maxim *communis error facit jus*. And the point is still an open one for the House of Lords"); Gold in 21 *Bell Yard*, 25–28; Beven, i, 568–570. If the case is correct, the law on this point has taken a departure from the earlier precedents: Street, *Foundations of Legal Liability*, Vol. 1, pp. 74–82; Pollock, pp. 96–106; Holmes, *Common Law*, pp. 84–89; Holdsworth, H.E.L., viii, pp. 453–458; Winfield and Goodhart, "Trespass and Negligence" (1933) 49 L.Q.R. 369–370.

considerable angle. *Stanley v. Powell* might have been decided on the ground that the plaintiff had voluntarily accepted the risk by joining the party,²⁴ but Denman J.²⁵ based his decision on the ground that even if the action were in trespass, not case, the injury being accidental the defendant could not be liable. In *National Coal Board v. Evans*²⁶ the Court of Appeal, holding inevitable accident to be a good defence in an action of trespass to chattels, approved the reasoning in *Stanley v. Powell*.

Intention or negligence must now be shown

In so far as *Stanley v. Powell* decided that inevitable accident was a good defence to an action of trespass it probably cannot now be questioned. But in recent years a series of decisions by puisne judges in England,²⁷ British Columbia,²⁸ and New Zealand²⁹ have extended *Stanley v. Powell* so far as to hold that a plaintiff in an action of trespass for injuries to the person must always prove intention or negligence on the part of the defendant. It is submitted that these decisions are open to review in an appellate court on the ground that they confuse the distinction between trespass and case which has been part of the common law "from time whereof the memory of man runneth not to the contrary." In this context the distinction has, or until very recently had, three important consequences. First, it has always been the understanding of the profession³⁰ that in trespass the defendant had to prove affirmatively that he was not negligent; in cases for injuries to the person the plaintiff had

²⁴ Winfield, 55 L.Q.R. 451, makes the point that in such a case it would be unnecessary for the defendant to disprove negligence. But surely the plaintiff takes upon himself the risk of careful, not of careless, shooting. And, even if that is not so, the difference in no way invalidates the suggestion that the case might have been decided on that ground.

²⁵ Landon (Pollock, p. 183) went too far in describing Denman J. as "an undistinguished puisne judge" who had obtained his position on the bench "*per stirpes* and not *per capita*." He was indeed a son of Lord Denman C.J. (and as the son of a peer was one of the few High Court judges permitted to decline the customary knighthood), but in his youth he had been a Senior Wrangler and a Fellow of Trinity, Cambridge.

²⁶ [1951] 2 K.B. 861.

²⁷ *Fowler v. Lanning* [1959] 1 Q.B. 426. In effect, this converted the exception into the general rule. The exception was the rule as to proof of negligence in actions arising out of highway accidents, which had become established in the nineteenth century (see above, § 12).

²⁸ *Walmsley v. Humenick* [1954] 2 D.L.R. 292.

²⁹ *Beals v. Hayward* [1960] N.Z.L.R. 181.

³⁰ See the vivid illustration in Sutton, *Personal Actions*, pp. 56-68.

to prove affirmatively intent or negligence in the defendant.^{30a} Hence when the plaintiff was injured by force applied directly to him by the defendant, his case was made by this fact and the onus then lay on the defendant to prove that the trespass was utterly without his fault.³¹ Secondly, there is a difference in relation to the proper test for remoteness of damage: in trespass it is directness, in negligence it is foreseeability.³² Thirdly, until the decision of the Court of Appeal in *Letang v. Cooper*,³³ there was a difference in relation to the running of time under the Limitation Act, 1989.

In any event, it was not every form of accident which provided a good defence. To succeed in such a defence it seemed that it was not enough for the defendant to prove that he was not negligent. So in *The Albano*³⁴ Lord Esher M.R. said that "a person relying on inevitable accident must show that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill." Again in *National Coal Board v. Evans*³⁵ the Court of Appeal approved the statement³⁶ that "no man shall be excused of a trespass . . . except it may be judged utterly without his fault." In other words, in such cases the defendant's act has not, in one sense, caused the accident.

^{30a} This sentence was cited with approval by Reed J. in *Exchange Hotel Ltd. v. Murphy* [1947] S.A.S.R. 112, 117.

³¹ Amongst the many cases which support this are: *Hall v. Fearnley* (1842) 3 Q.B. 919; *Sadler v. South Staffs. Steam Tramways Co.* (1889) 23 Q.B.D. 17; *Blacker v. Waters* (1928) 28 S.R.(N.S.W.) 406; *Cook v. Lewis* [1952] 1 D.L.R. 1, 15; *Southport Corporation v. Esso Petroleum, Ltd.* [1953] 3 W.L.R. 773, 781; *Joyce v. Bartlett* [1955] 1 D.L.R. 615; *O'Brien v. McNamee* [1953] I.R. 86; *McHale v. Watson* (1964) 38 A.L.J.R. 266.

³² *The Wagon Mound (No. 2)* [1963] 1 Lloyd's Rep. 402. See below, § 206.

³³ [1965] 1 Q.B. 232. See below, § 225.

³⁴ [1892] P. 419, at 429; Holmes, *Common Law*, p. 85; Gold, 21 *Bell Yard*, 39. But see above, § 9.

³⁵ [1951] 2 K.B. 861.

³⁶ In *Weaver v. Ward* (1607) Hob. 134.

DEFAMATION

§ 53. Defamation Defined ¹

THE wrong of defamation consists in the publication of a false and defamatory statement concerning another person without lawful justification. The wrong has always been regarded as one in which the court should have the advantage of the personal presence of the parties if justice is to be done. Hence not only does an action of defamation not survive for or against the estate of a deceased person,² but a statement about a deceased person is not actionable at the suit of his relatives, however great their pain and distress, unless the statement is in some way defamatory of them.³

Libel and slander

A defamatory statement is not necessarily made in words, either written or spoken. A man may defame another by his

¹ Reference may be made to: Gatley, *Libel and Slander*, 5th ed., 1960; Odgers, *Libel and Slander*, 6th ed., 1929; Duncan and Hoolahan, *Guide to Defamation Practice*, 2nd ed., 1958. The Report of the Committee on the Law of Defamation (1948, Cmd. 7536), of which Lord Porter was chairman, is invaluable. The majority of the reforms recommended by the Committee were enacted by the Defamation Act, 1952. The debates in both Houses of Parliament are of great interest: see H.C.Deb., Vols. 495, col. 507; 500, col. 723; 502, col. 2712; 177 H.L.Deb. 1087; 178, col. 304. The detailed amendments made by the Act will be dealt with in the appropriate places. Here it is enough to say that it is a welcome attempt to reform a notoriously difficult and important branch of the law. Yet it is worth remembering that a member of the Porter Committee has said that it "lacked evidence from plaintiffs; this made it the more difficult to hold the scales evenly and to avoid being too much impressed by the recorded hardships of defendants since little was known about where the shoe pinched for the plaintiff": Wade, "Defamation" (1950) 66 L.Q.R. 348. See also Lloyd, "Reform of the Law of Libel" [1952] C.L.P. 168. Time alone will show whether the Act (and especially its provisions relating to "unintentional defamation," below, § 101) has not weakened to a serious degree the protection which the common law has always given to the reputation of the private citizen.

² See below, § 184.

³ Report of Porter Committee, para. 27. For the interesting steps taken by the relatives of Mr. Gladstone to defend his honour against the disgraceful aspersions of Captain Wright, see Dean, *Hatred, Ridicule or Contempt*; Walton, "Libel upon the Dead and the Bath Club Case" (1927) 9 J.C.L. 1.

acts no less than by his words. To exhibit an insulting picture⁴ or effigy⁵ holding up the plaintiff to ridicule or contempt is an actionable libel.

The wrong of defamation is of two kinds—namely, libel and slander.⁶ In libel the defamatory statement is made in some permanent and visible form, such as writing, printing, pictures, or effigies.⁷ In slander it is made in spoken words or in some other transitory form, whether visible or audible, such as gestures or inarticulate but significant sounds. It is not always easy to determine whether in a particular case the proper cause of action is libel or slander. Is the true difference between the two that slander is addressed to the ear, libel to the eye?⁸ Or is it that libel is defamation crystallised into some permanent form, while slander is conveyed by some transient method of expression? The Court of Appeal in *Yousouppoff v. Metro-Goldwyn-Mayer Pictures*⁹ did not have much difficulty in holding that defamation in a “talking” film was libel. But there is no authority as to whether defamatory matter recorded on a gramophone disc (unaccompanied by any pictorial or other matter) is libel or slander. Winfield thought it is slander,¹⁰ others think it is libel.¹¹ It is addressed to the ear, not to the eye, but it is in permanent, not in transient form. It is submitted that the correct answer is that to utter defamatory words with the intention that they shall be recorded is slander only, but that when the record has been made, if it is published, the manufacturer is responsible for libel. In such a case the person whose voice is recorded would, it seems, become liable for libel on the ordinary principles of vicarious liability, and presumably those who distribute or play the record to third persons are in the same position as the disseminators of a written

⁴ *Du Bost v. Beresford* (1810) 2 Camp. 511; *Garbett v. Hazell, Watson and Viney, Ltd.* [1949] 2 All E.R. 359 (juxtaposition of pictures with captions). One may “Convey a libel in a frown, And wink a reputation down”: Swift, *Journal of a Modern Lady*.

⁵ *Monson v. Tussauds, Ltd.* [1894] 1 Q.B. 671.

⁶ Libel and slander give rise to distinct causes of action even if the nature of the defamation is the same in both: libel is one genus, slander a different genus: *Weber v. Birkett* [1925] 2 K.B. 152.

⁷ *Monson v. Tussauds, Ltd.* [1894] 1 Q.B. 671, 692.

⁸ So held in *Mitchell v. Australian Broadcasting Commission* (1958) 60 W.A.L.R. 38.

⁹ (1934) 50 T.L.R. 581.

¹⁰ *Tort*, p. 579.

¹¹ e.g., Landon in Pollock, *Torts*, p. 176.

libel. The Defamation Act, 1952, settles a disputed point by providing¹² that the broadcasting of words¹³ by means of wireless telegraphy¹⁴ shall be treated as publication in permanent form.

Although libel and slander are for the most part governed by the same principles, there are two important differences:

- (1) Libel is not merely an actionable tort, but also a criminal offence; whereas slander is a civil injury only.
- (2) Libel is in all cases actionable *per se*; but slander is, save in special cases, actionable only on proof of actual damage. This distinction has been severely criticised as productive of great injustice.¹⁵ It was recognised by the Porter Committee to be "arbitrary and illogical,"¹⁶ but a majority of the Committee was not willing to recommend, or Parliament to enact, that libel and slander should be assimilated.

The different rules applicable to the wrongs of libel and slander are due to the different historical origin of the two actions.¹⁷ The rules relating to slander derive from the common law action on the case, the rules relating to libel from criminal proceedings in the Star Chamber.

§ 54. Nature of a Defamatory Statement

A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him in the estimation of right-thinking members of society generally¹⁸ and in particular to

¹² s. 1.

¹³ Defined by s. 16 (1) to include pictures, visual images, gestures and other methods of signifying meaning.

¹⁴ As defined by s. 16 (3), means publication for general reception by means of wireless telegraphy within the meaning of the Wireless Telegraphy Act, 1949.

¹⁵ See Prosser, "Libel Per Quod" (1960) 46 Va.L.Rev. 839.

¹⁶ Cmd. 7356, para. 38.

¹⁷ See Holdsworth, H.E.L., v, pp. 205-212; viii, pp. 333-378; Veeder, A.A.L.H., iii, 446; O'Sullivan, "Evolution of the Law of Libel" [1950] C.L.P. 84.

¹⁸ *Sim v. Stretch* (1936) 52 T.L.R. 669, at 671, *per* Lord Atkin. *Cf.* *Cave J. in Scott v. Sampson* (1882) 8 Q.B.D. 491, 503: "All false statements to a man's discredit." (Approved by Scrutton L.J. in *Youssouf v. M.-G.-M. Pictures, Ltd.* (1934) 50 T.L.R. 581, 584.)

cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem.¹⁹ The statement is judged by the standard of an ordinary, right-thinking member of society. Hence the test is an objective one, and it is no defence to say that the statement was not intended to be defamatory, or uttered by way of a joke.²⁰ A tendency to injure or lower the reputation of the plaintiff suffices, for "If words are used which impute discreditable conduct to my friend, he has been defamed to me, although I do not believe the imputation, and may even know that it is untrue."²¹ Hence apparently a statement may be defamatory although no one believes it to be true.²²

Injurious falsehood

A defamatory statement must be distinguished from one which is merely injurious. Both are falsehoods told by one man to the prejudice of another, and both are on certain conditions actionable; but they are to a large extent governed by different rules. An injurious statement is a falsehood told about another which in no way affects his reputation, but nevertheless in some other manner causes loss to him. Thus it is not defamatory to state in a newspaper that a certain tradesman has ceased to carry on business; yet if this statement is wilfully false, and causes him actual damage, an action will lie for it. But to state falsely that he carries on business incompetently or dishonestly is defamatory, and an action will lie even though the statement is not wilfully false and even though actual damage has not been caused by it. Similarly, to say falsely of a shopkeeper that his goods are of a quality inferior to those of another trader is not the wrong of defamation, but that of injurious falsehood; but to say of him that he fraudulently sells inferior goods as of superior quality is an attack, not merely upon his business, but upon his reputation, and is therefore defamatory. The law of injurious falsehood, as distinguished from that of defamation, will be considered in a later chapter.²³

¹⁹ *Capital & Counties Bank v. Henty* (1882) 7 App.Cas. 741.

²⁰ *Capital & Counties Bank v. Henty* (1882) 7 App.Cas. 741, 772.

²¹ *Hough v. London Express* [1940] 2 K.B. 507, at 515, *per* Goddard L.J.

²² As in *Theaker v. Richardson* [1962] 1 W.L.R. 151.

²³ Chap. 17.

Abuse

Mere insult or vulgar abuse does not amount to defamation,²⁴ whether it be spoken or written.²⁵ Defamation is a false statement or suggestion of fact to the prejudice of a man's reputation; insult consists in words or conduct offensive to a man's dignity. Insult in itself seems to be no cause of action by the law of England, though particular forms of insult are actionable because accompanied by other facts which confer a right of action. 'Assault, false imprisonment, and certain kinds of wilful and wanton trespasses to property amount to insults, as being attacks upon the dignity of the plaintiff as well as upon his person or property; and aggravated damages may accordingly be obtained for them.'²⁶ Insulting threats not amounting to assault are apparently not actionable at all, unless they fall under the rubric of intentional infliction of emotional distress.²⁷ But persons given to using abusive language may be required to enter into sureties to be of good behaviour under the Justices of the Peace Act, 1861, or prosecuted under the Public Order Act, 1936.²⁸

Hatred, ridicule, and contempt

The test of the defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinions or feelings of other persons. The typical form of defamation is an attack upon the moral character of the plaintiff, attributing to him any form of disgraceful conduct, such as crime, dishonesty, untruthfulness, ingratitude, or cruelty. But a statement may be defamatory if it tends to bring the plaintiff into ridicule or contempt even though there is no suggestion of any form of misconduct.²⁹ An action will lie, therefore, for the publication of a humorous story which exhibits the plaintiff in a ridiculous light, or for a caricature of his personal appearance or manners.³⁰ In

²⁴ *Parkins v. Scott* (1862) 1 H. & C. 153 ("You have been a whore from your cradle").

²⁵ *Contra*, Winfield, *Tort*, p. 580. But this overlooks the fact that abuse is one thing and defamation another.

²⁶ Below, § 205.

²⁷ Below, § 84.

²⁸ *Ward v. Holman* [1964] 2 Q.B. 580.

²⁹ *Cook v. Ward* (1830) 6 Bing. 409.

³⁰ *Dunlop Rubber Co. v. Dunlop* [1921] 1 A.C. 367. (Mr. Dunlop, the inventor of the pneumatic tyre and "a plain and ordinary citizen of Dublin," depicted in advertisements as a foppish old gentleman.)

some circumstances it might even be defamatory to say of a man that his acts were legally justified. Right-minded men sometimes think the less of one who has successfully pleaded a technical defence—e.g., the Gaming Acts or the Statute of Limitations. Successful litigants have in the past been booed on leaving the court.³¹ Again a statement is defamatory if it amounts to a reflection upon the fitness or capacity of the plaintiff in his profession or trade, or in any other undertaking assumed by him.³² So a novelist recovered damages against the publishers of a magazine for publishing under his name a story of which he was not the writer, on the ground that anyone reading the story would think him a mere commonplace scribbler.³³ So also a statement is defamatory if it attributes insanity to the plaintiff, though insanity is a misfortune, not a fault,³⁴ or if it imputes insolvency to a trader, even though there is no suggestion of discreditable conduct or incapacity,³⁵ or if it contains an allegation that a woman has been raped.³⁶ But it is not defamatory if it merely alleges a breach of conventional etiquette³⁷—presumably because that does not lower the plaintiff in the estimation of right-minded people. Still, what is not defamatory today may be defamatory tomorrow, for the political and social ideas of the reasonable man alter with the times. Thus the appellations German,³⁸ Czech,³⁹ “Jewish international financier,”⁴⁰ and Communist⁴¹ have all at different times been held capable of a defamatory meaning.

³¹ *Clarke v. Associated Newspapers, Ltd.*, 1955 C.A. 158 (unrep.), per Singleton L.J.

³² *Capital & Counties Bank v. Henty* (1882) 7 App.Cas. 771.

³³ *Ridge v. The English Illustrated Magazine* (1913) 29 T.L.R. 592. Cf. *Archbold v. Sweet* (1892) 5 C. & P. 219, where the defendants published a third edition of the plaintiff's work on criminal law (with “many errors and mistakes”) without stating that it had not been edited by the plaintiff.

³⁴ *Morgan v. Lingen* (1863) 8 L.T.(N.S.) 800.

³⁵ *Read v. Hudson* (1700) 1 Lord Raym. 610.

³⁶ *Youssoupoff v. Metro-Goldwyn-Mayer Pictures* (1934) 50 T.L.R. 581.

³⁷ *Sim v. Stretch* (1936) 52 T.L.R. 669, 672.

³⁸ *Slazengers, Ltd. v. C. Gibbs & Co.* (1916) 33 T.L.R. 35.

³⁹ *Linklater v. Daily Telegraph Ltd.*, *The Times*, November 11, 1964.

⁴⁰ *Camrose v. Action Press, Ltd.* (1937) *The Times*, October 14 (damages: £12,500, Hilbery J. emphatically refusing a stay of execution). The report in the *Daily Telegraph* makes it quite clear that it was not alleged that the appellation “Jew” alone was defamatory. The innuendo was that the plaintiff was unscrupulous and unpatriotic. Cf. *De Stempel v. Dunkels* [1938] 1 All E.R. 238.

⁴¹ See note on p. 201.

A statement is not defamatory merely because it excites hatred, contempt, ridicule, or other adverse feelings in some particular class of the community whose standard of opinion is such that the law cannot approve of it or notice it. "We have to consider in this connection the *arbitrium boni*, the view which would be taken by the ordinary good and worthy subject of the King."⁴² Thus in *Byrne v. Deane*⁴³ the plaintiff complained of a typewritten piece of doggerel on the notice-board of a golf club which suggested that he had been guilty of disloyalty to his fellow-members by reporting to the police that there were some "diddler" (gambling) machines kept on the premises.⁴⁴ Although it is quite clear that any such charge would lower the plaintiff in the estimation of most of his fellow-members it was held that it cannot be defamatory to say of a man that he has put in motion the proper machinery for suppressing crime.⁴⁵ So no ordinary person would, it is said, think the less of a student who is alleged to do espionage work in his or her university on behalf of the police.⁴⁶

§ 55. Proof of Reference to the Plaintiff

It is essential in every action for defamation that the defamatory statement should be shown to refer to the plaintiff. It is never necessary, however, that this reference should be express. It may be latent; and it is sufficient in such a case that it should have been understood even by one person, although it remained hid from all others. Thus in *Le Fanu v. Malcolmson*⁴⁷ the defendants published in a newspaper a statement that in some of the Irish factories cruelties were practised upon the workpeople, and they were held liable on a finding by the jury that the statement was understood to refer specially to the plaintiff's factory at Portlaw in County Waterford.

⁴¹ *Braddock v. Bevins* [1948] 1 K.B. 580; *Dennison v. Sanderson* [1946] 4 D.L.R. 814; *Lewis v. Smith* (1959) *The Times*, July 10.

⁴² *Byrne v. Deane* [1937] 1 K.B. 818, at 838, per Slesser L.J.

⁴³ [1937] 1 K.B. 818. See also *Fraser v. Kemsley Newspapers, Ltd.* (1959) *The Times*, June 2.

⁴⁴ The words were: "But he who gave the game away May he hyrrn in hell and rue the day."

⁴⁵ A different view is taken in the United States: Harper and James, i, 350.

⁴⁶ *Prinsloo v. S.A. Associated Newspapers, Ltd.*, 1959 (2) S.A. 693.

⁴⁷ (1848) 1 H.L.C. 637.

Innocence no defence at common law ⁴⁸

Nor is it necessary that the defendant should have intended the defamatory statement to refer to the plaintiff. The question in each case is not whether the defendant intended any such reference, but whether any person to whom the statement was published might reasonably think that the plaintiff was the person referred to. Nor is it any defence that the defendant had no reason to suppose that any such reference would be attributed to his words, or even did not know that any such person as the plaintiff existed. This application or extension of the doctrine that a man publishes defamatory statements at his peril was established by the House of Lords in *Hulton & Co. v. Jones*.⁴⁹ A newspaper published an article descriptive of life in Dieppe, in which one Artemus Jones, described as a churchwarden at Peckham, was accused of living with a mistress in France. The writer of the article was ignorant of the existence of any person of the name of Artemus Jones and invented the name as that of the fictitious character in his narrative. Unfortunately, however, the name so chosen was that of a real person, a barrister and journalist, and those who knew him supposed the newspaper article to refer to him. It was held by a majority of the Court of Appeal that the newspaper was responsible for a libel and the decision was unanimously affirmed (in an unreserved judgment) by the House of Lords.⁵⁰

Even if the defamatory words are true of some other person it is not impossible for them to be at the same time defamatory of the plaintiff, for they may be understood by reasonable persons to refer to him.⁵¹ Thus in *Newstead v. London Express*

⁴⁸ See now § 58, below, for position under 1952 Act.

⁴⁹ [1910] A.C. 20.

⁵⁰ There is some evidence that the decision may have been based on the recklessness or even spite of the defendants. Stallybrass always said that this was the opinion of Lord Hewart, who was counsel for the plaintiff at all three stages of the trial. The plaintiff had been a contributor to the defendants' paper for twelve years and his name was well known in their office, although not to the actual writer of the article. The managing director admitted in cross-examination that he had read the article in proof and thought at first reading that it referred to the plaintiff. See 10th ed., p. 377, n. (x) and letters to *The Spectator* of November 5 and 12, 1948, from Lady Artemus-Jones and Dr. C. K. Allen. Lord Uthwatt told the present editor that after *Hulton v. Jones* the House of Lords had made it a rule of practice never to deliver an unreserved judgment—though there is at least one reported exception to this: see below, p. 406.

⁵¹ Mr. Robert Graves had taken the point in 1936: see his admirable novel, *Antigua*, Penny Puce, p. 252.

*Newspaper Ltd.*⁵² the defendants published an account of a trial for bigamy of "Harold Newstead, thirty-year-old Camberwell man." It was a true account of the trial of one Harold Newstead, a Camberwell barman, but not of Harold Newstead, a Camberwell hairdresser, of about the same age. The Court of Appeal held that the jury would have been justified in finding that reasonable persons would have understood the words complained of to refer to the latter. Where the words complained of are *ex facie* defamatory the hardship is not so serious as might appear. Writers who publish such statements may not unreasonably be expected to identify the person described so closely that the words cannot reasonably be capable of referring to someone else.⁵³

Defamation of a class of persons

In every case where the plaintiff is not named the test whether the words used refer to him is the question whether the words are such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to. If the words can be regarded as capable of referring to the plaintiff, the jury still have to decide the question of fact—Do they lead reasonable people, who know him, to the conclusion that they do refer to him?⁵⁴ "The reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement, for the habit of making unfounded generalisations is ingrained in ill-educated or vulgar minds, or the words are occasionally intended to be facetious exaggeration."⁵⁵ Thus no action would lie at the suit of anyone for saying that all mankind is vicious and depraved, or even for alleging that all clergymen are hypocrites or all lawyers dishonest.⁵⁶ For charges so general in their nature are merely vulgar generalisations.

⁵² [1940] 1 K.B. 377. See also *Lee v. Wilson* (1934) 51 C.L.R. 276.

⁵³ See the caustic judgment of MacKinnon L.J. [1940] 1 K.B. 377, at 391-393.

⁵⁴ *Knupffer v. London Express Newspaper* [1944] A.C. 116, 121.

⁵⁵ *Ibid.*, at 122, *per* Lord Atkin.

⁵⁶ *Eastwood v. Holmes* (1858) 1 F. & F. 347. "English law," says Professor Lloyd ([1952] C.L.P. 178), "takes the view that if you only contrive to spread your vilifications sufficiently widely you may do so with impunity." No doubt the criminal law of seditious libel might be invoked in serious

But if the class is so small or so completely ascertainable that what is said of the class is necessarily said of every member of it, then a member of the class can sue.⁵⁷ Again, although the words purport to refer to a class, if in fact in the particular circumstances of the case they point to one or more individual persons, those persons will have an action: *Le Fanu v. Malcolmson*,⁵⁸ the facts of which have already been given, is an example of this. In deciding the question, the size of the class, the generality of the charge and the extravagance of the accusation may all be elements to be taken into consideration.⁵⁹ Similarly, an imputation may be defamatory and actionable at the suit of the plaintiff if it is made against some unspecified members of a class to which he belongs even though it is impossible to show that the defendant meant or was understood to mean the plaintiff individually. Thus if the defendant says in writing that his horse has been stolen either by A or B, he knows not which, then both A and B will have an action against him, for both are thereby brought under suspicion and defamed.⁶⁰ But here also the class must not be so large that the charge ceases to affect the reputation of any individual member of it.

§ 56. Proof of Defamatory Meaning

Although the proper interpretation of a statement alleged to be defamatory may give rise to difficult questions of construction, there is one point which is perfectly clear and unquestioned: a statement is none the less defamatory because the defendant did not intend to bring the plaintiff into hatred, ridicule or contempt. The meaning to be attached to it is not necessarily the meaning with which the defendant published it but that which is, or may be presumed to be, reasonably given

cases. Neither the Porter Committee nor (after much discussion) Parliament could find a suitable remedy for "group defamation." For a curious unreported case in which a newspaper thought it prudent to settle an action brought by the 134 valuers of the L.C.C., see 682 H.C. Deb. 5 s., cols. 456-463.

⁵⁷ *Browne v. D. C. Thomson & Co.*, 1912 S.C. 359.

⁵⁸ (1848) 1 H.L.C. 687.

⁵⁹ *Knupffer's Case* [1944] A.C. 116, 124.

⁶⁰ *Harrison v. Thornborough* (1713) 10 Mod. 196. A verbal statement to this effect, however, would presumably fall within the rule that in the case of the imputation of a criminal offence words of mere *suspicion* are not actionable without proof of special damage: below § 76.

to it by the person to whom it is published. A defamatory purpose will not render the defendant liable if the statement has for others no libellous significance⁶¹; conversely, an innocent intention will be no defence for a person who makes a statement which has a defamatory meaning for those to whom he makes it,⁶² though the fact that his intention was innocent may be given in evidence in mitigation of damages.⁶³ Just as it was no defence before the Defamation Act, 1952, to say that it was not intended to publish the words of and concerning the plaintiff, so it was no defence to say that the words were not intended to be defamatory.

Functions of judge and jury

The interpretation of a defamatory statement is a question of fact for a jury. Since the Libel Act, 1792 (usually called Fox's Act), "libel or no libel" has always been essentially a question for the jury.⁶⁴ It is true that the Act of 1792 is in terms limited to criminal proceedings, but it has always been regarded as merely declaratory of the common law.⁶⁵ The right of the jury in this matter is subject, however, to one limitation. The judge must first be satisfied that there is sufficient evidence to go to the jury—that is to say, he must be satisfied that the statement is reasonably capable of the meaning which the plaintiff alleges and complains of, and if he considers that it is not so capable, the case must be withdrawn from the jury altogether.⁶⁶ If more than one defamatory meaning is alleged, then the judge

⁶¹ *Sadgrove v. Hole* [1901] 2 K.B. 1.

⁶² *Hulton & Co., Ltd. v. Jones* [1910] A.C. 20, 23. For the innuendo, see below, § 57.

⁶³ See below, § 75.

⁶⁴ *Broome v. Agar* (1928) 138 L.T. 698.

⁶⁵ *Truth (N.Z.), Ltd. v. Holloway* [1960] N.Z.L.R. 69, 92.

⁶⁶ *Morris v. Sanders Universal Products* [1954] 1 W.L.R. 67; *Lewis v. Daily Telegraph, Ltd.* [1964] A.C. 234. In *Turner v. M.-G.-M. Pictures, Ltd.* [1950] 1 All E.R. 449, at 454, Lord Porter said: "To put it from the point of view of an appellate court, the question of libel or no libel should have been left to the jury if it cannot be said that twelve men could not reasonably have come to the conclusion that the words were defamatory." The H.L. in this case pointed out that the practice of taking the verdict of the jury before ruling whether the words complained of are capable of defamatory meaning, although it has the advantage of avoiding the expense of a new trial if the judge rules there is no case to go to the jury but the C.A. take a different view, may lead to difficulty in some cases.

must rule whether the words are capable of bearing each, and if so, which, of those meanings.⁶⁷

Thus in *Capital and Counties Bank v. Henty*⁶⁸ the defendants, having had a dispute with one of the branch managers of the plaintiff bank, sent a circular notice to their own customers⁶⁹ in these words: "Henty and Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank." An action for libel was thereupon brought by the bank, alleging that the notice was defamatory, inasmuch as it amounted to an imputation of insolvency. It was held, however, by the House of Lords that the statement was not reasonably capable of such a meaning, and that there was no case fit to be left to a jury, although the notice resulted in a run of a quarter of a million pounds on the bank immediately it was issued. *Henty's* case has often been cited by defendants seeking to contend that if one non-defamatory meaning can be found the plaintiff cannot succeed, but it does not mean that.⁷⁰ It is more difficult to say positively what it does mean, for there are a large number of different judicial interpretations, particularly in cases involving innuendoes.⁷¹ The most simple test⁷² is that in deciding whether the words are capable of a defamatory meaning the court will reject those meanings which can emerge only as the product of some strained or forced or utterly unreasonable interpretation.

On the other hand, the words may be so plainly and necessarily defamatory that the judge should instruct the jury that they are

⁶⁷ *Lewis v. Daily Telegraph, Ltd.* [1964] A.C. 234, 286.

⁶⁸ (1882) 7 App.Cas. 741.

⁶⁹ This was an important point: see *Tolley v. Fry* [1931] A.C. 333, 342; *Lewis v. Daily Telegraph, Ltd.* [1964] A.C. 234, 246.

⁷⁰ *Lewis v. Daily Telegraph Ltd.* [1964] A.C. 234, 246. In *Yousoupoff v. M.-G.-M. Pictures Ltd.* (1934) 50 T.L.R. 581, 584, Scrutton L.J. suggested that the law and the facts got pretty far apart from each other in *Henty's* case. Nor is it easy to understand why the words "R.D." (or their equivalent) on the cheque of a non-trader should be held incapable of a defamatory meaning: *Plunkett v. Barclays Bank Ltd.* [1936] 2 K.B. 107. The Irish Supreme Court was equally divided on the question in *Pyke v. Hibernian Bank Ltd.* [1950] I.R. 195; and now "Present Again" has been held capable of a defamatory meaning: *Baker v. Australia and N.Z. Bank Ltd.* [1958] N.Z.L.R. 907.

⁷¹ For these, see below, § 57.

⁷² *Jones v. Skelton* [1963] 1 W.L.R. 1362, 1370, per Lord Morris of Borth-y-Gest.

calculated to bring the plaintiff into hatred or contempt, and should forthwith proceed to direct their attention to the question of damages. If a jury find a plain and obvious defamation, incapable of any innocent explanation, to be non-libellous, their verdict will certainly be set aside.⁷³ But the circumstances must be very exceptional to justify such a course.⁷⁴ There appear to be only two reported cases in which the verdict of a jury,⁷⁵ and none in which the finding of a judge sitting alone,⁷⁶ has been reversed on appeal.

§ 57. The Innuendo ⁷⁷

It is clear then that no statement is necessarily and in all circumstances defamatory. There is no charge or imputation, however serious on the face of it, which may not be explained away by evidence that in the special circumstances of the case it was not made or understood in a defamatory sense. It may be shown to have been made in jest, or by way of irony, or in some metaphorical or secondary innocent sense, and that it was or ought to have been understood in that sense by those to whom it was made. Even the term "Ananias" is not necessarily defamatory.⁷⁸ Conversely, no statement is necessarily and in all circumstances innocent. An allegation which on the face of it contains no imputation whatever against the plaintiff may be proved from the circumstances to have contained a latent and secondary defamatory sense. It may suggest an imputation which it does not express. Thus even the language of praise may be sued on as defamatory, on proof that it was used in the

⁷³ *Lockhart v. Harrison* (1928) 139 L.T. 521, at 523, 524 (see the amusing explanation of this case given by Norman Birkett, K.C., the plaintiff's counsel, in 176 L.T.J. 453).

⁷⁴ *Lockhart v. Harrison* (1928) 139 L.T. 521, 524, where Lord Dunedin regretted the result: "I think the letter in question the mean letter of a coward. . . . That it was a libel has been the opinion of every judge who has had the case before him; but, of course, that is not the question. The question is whether it is a verdict at which twelve reasonable men could possibly have arrived."

⁷⁵ *Lockhart v. Harrison* (1928) 139 L.T. 521, 524.

⁷⁶ *Dingle v. Associated Newspapers Ltd.* [1964] A.C. 371, 376.

⁷⁷ The following pages (somewhat rewritten in this edition) were approved as an accurate statement of the law in *Grubb v. Bristol United Press Ltd.* [1963] 1 Q.B. 309, 328, 339, per Holroyd Pearce and Davies L.JJ.

⁷⁸ *Australian Newspaper Co. v. Bennett* [1894] A.C. 284.

way of irony.⁷⁹ Although no statements are necessarily defamatory or necessarily innocent, yet all statements are divisible into two classes, according as they are (1) *prima facie* and on the face of them defamatory, or (2) *prima facie* and on the face of them innocent.

1. Statements *prima facie* defamatory

A statement is *prima facie* defamatory when its natural, obvious, and primary sense is defamatory: such a statement is actionable unless its defamatory significance is successfully explained away; and the burden of such an explanation rests upon the defendant. A statement *prima facie* innocent, on the other hand, is not actionable unless it has a latent or secondary defamatory meaning which is sufficiently proved by the plaintiff. So the plaintiff must bring evidence to establish a slang or cant meaning which he attaches to an apparently innocent word such as "pansy."⁸⁰ In determining whether the words in their natural and ordinary meaning are defamatory the jury may have regard to the mode and occasion of the publication,⁸¹ for example, that they were published in large italicised block type in a popular newspaper.⁸² Sometimes a derogatory imputation can be found not so much in what one says as in the way one says it; for example, in a telegram instead of a letter.⁸³

2. Statements *prima facie* innocent

When a statement is *prima facie* innocent, the plaintiff must expressly and explicitly set forth in his pleadings the defamatory sense which he attributes to it.⁸⁴ Such an explanatory statement is called an innuendo.⁸⁵ It is now clearly established that

⁷⁹ *Boydell v. Jones* (1838) 4 M. & W. 446.

⁸⁰ *Thaarup v. Hulton Press* (1943) 169 L.T. 309. ("I personally was not alive to the slang meaning of the word, nor, I think, was my brother MacKinnon, but my brother Goddard fortunately was quite alive to it, having had judicial experience as a result of which he had come to know about it": *per* Scott L.J., 169 L.T. at 310.)

⁸¹ *Capital and Counties Bank v. Henty* (1882) 7 App.Cas. 741, 744.

⁸² *English and Scottish Co-op. Society v. Odhams Press* [1940] 1 K.B. 440, 452-453.

⁸³ Goodhart, Note, 52 L.Q.R. 454.

⁸⁴ He must also "give particulars of the facts and matters on which he relies in support of such sense": Ord. 82, r. 8 (1).

⁸⁵ This term is also sometimes used of the identification of the plaintiff as the person referred to: above, § 55.

it is not a true innuendo to repeat the obvious meaning of defamatory words in other language, or in an embroidered or exaggerated way.⁸⁶ Otherwise an ingenious pleader could perplex the judge and jury and harry the defendant⁸⁷ by ringing the changes on the same words,⁸⁸ creating numerous different causes of action. But although each innuendo gives rise to a distinct cause of action, the court can look at the substance of the matter, and ask the jury to give one verdict and make one award of damages, or permit the defendant to pay one single sum into court.⁸⁹ The plaintiff is bound by his own innuendo and must prove the meaning as so alleged by him.⁹⁰ He cannot at the trial fall back upon some other secondary and latent sense, instead of that which he himself alleged in his pleadings, although he may fall back on the primary defamatory sense of the statement.⁹¹

Pleading innuendoes

Until the Common Law Procedure Act, 1852, it was necessary for the plaintiff to set out all the special circumstances which rendered the words complained of defamatory. The introductory averments were known as the colloquium.⁹² The Act of 1852 rendered it no longer necessary to set out on the record the facts and the colloquium necessary to support an innuendo; they are now only matter of proof on the trial, but the principle remains.⁹³ It is the common practice to plead prefatory averments in support of the innuendo alleged, though this is no longer legally necessary,⁹⁴ as distinct from the requirement of furnishing particulars of the extrinsic facts under R.S.C., Ord 82, r. 3 (1).⁹⁵ The evidence required is evidence of special facts,

⁸⁶ *Lewis v. Daily Telegraph Ltd.* [1964] A.C. 234.

⁸⁷ In particular, by preventing him from obtaining particulars under Ord. 19, r. 16 (2) of the extrinsic facts necessary to support a true innuendo. *Loughans v. Odhams Press Ltd.* [1963] 1 Q.B. 299, which seemed to permit such ingenuity, did not really do so: *Lewis v. Daily Telegraph Ltd.* [1964] A.C. 234, 273, 280.

⁸⁸ As in *Grubb v. Bristol United Press Ltd.* [1963] 1 Q.B. 309.

⁸⁹ *Pedley v. Cambridge Newspapers Ltd.* [1964] 1 W.L.R. 988.

⁹⁰ "Truth" (N.Z.), *Ltd. v. Holloway* [1960] 1 W.L.R. 997.

⁹¹ *Sim v. Stretch* (1936) 52 T.L.R. 669, 671.

⁹² On this see Holdsworth, H.E.L., viii, pp. 368-369.

⁹³ *Tolley v. Fry & Sons Ltd.* [1931] A.C. 333, 349.

⁹⁴ *Duncan and Hoolahan*, p. 23.

⁹⁵ *Lewis v. Daily Telegraph Ltd.* [1964] A.C. 234. Lord Devlin (at pp. 279-280) said there should be three paragraphs in a statement of claim—

causing the words to have a meaning revealed to those who knew the special facts, but not revealed by the words used in the absence of such knowledge.⁹⁶

A striking example of such an innuendo being successfully pleaded can be found in *Tolley v. J. S. Fry & Sons Ltd.*⁹⁷ In that case an amateur golf champion sued the defendants, a firm of chocolate manufacturers, who had published an advertisement in the middle of which "there appeared a caricature of Mr. Tolley hitting one of his most vigorous drives, with a carton of Fry's chocolate sticking prominently out of his pocket and a comic caddy dancing with another carton of Fry's chocolate in his hand, and comparing in doggerel verse the excellence of the drive with the excellence of the chocolate. Mr. Tolley was, as most people would be, much annoyed at this piece of offensive vulgarity, which reflects very little credit on the good taste of those who control the advertising of Messrs. Fry. He does not eat Fry's chocolate, and his permission for the appearance of the cartoon had not been asked."⁹⁸ The innuendo alleged was in effect that he had consented to the use of his portrait as an advertisement for reward and had prostituted his reputation as an amateur golfer. The House of Lords held that there was evidence on which a jury would be entitled to find the advertisement to be defamatory of the plaintiff,⁹⁹ but ordered a new trial on the issue of damages.¹

Cassidy's case

When the law relating to proof of an innuendo is combined with the rule that the test of the defamatory nature of a statement is objective and not subjective, it may well be asked whether it is not a necessary conclusion that a person is

(1) setting out the primary meaning; (2) the indirect meaning which goes beyond the primary or literal meaning, but is inherent in it, (3) the secondary meaning, or true legal innuendo.

⁹⁶ *Tolley v. Fry* [1930] 1 K.B. 467, 480.

⁹⁷ [1931] A.C. 333.

⁹⁸ [1930] 1 K.B. 467, at 472, *per* Scrutton L.J.

⁹⁹ Lord Blanesburgh dissenting on the ground that it was just because the publication was so offensive that no reasonable man could be assumed to have taken it seriously: to him it was (p. 347) "only another instance of the toll levied on distinction for the delectation of vulgarity." We have already seen (above, § 5) that the infringement of privacy is not yet a recognised tort.

¹ A common jury had awarded the plaintiff £1,000.

responsible for a statement which he believes to be innocent, but which is in fact defamatory by reason of facts unknown to him but known to the persons to whom he makes it. To this question the majority of the Court of Appeal gave an affirmative answer in *Cassidy v. Daily Mirror Newspapers Ltd.*² "The facts in this case are simple. A man named Cassidy, who for some reason also called himself Corrigan and described himself as a General in the Mexican Army, was married to a lady who also called herself Cassidy or Mrs. Corrigan. Her husband occasionally came and stayed with her at her flat, and her acquaintances met him. Cassidy achieved some notoriety in racing circles and in indiscriminate relations with women, and at a race meeting he posed, in company with a lady, to a racing photographer, to whom he said he was engaged to marry the lady and the photographer might announce it."³ The defendants accordingly published the photograph with the following words underneath: "Mr. M. Corrigan, the racehorse owner, and Miss 'X,' whose engagement has been announced." The innuendo placed upon these words by the plaintiff was that she was an immoral woman who had cohabited with Corrigan without being married to him, and some female acquaintances of the plaintiff gave evidence that they had formed a bad opinion of her on that ground as a result of the publication. The jury found that the words did reasonably bear a defamatory meaning, and awarded the plaintiff £500 damages. A majority of the Court of Appeal held that their verdict could not be disturbed. Further, it has since been laid down⁴ that where words are capable of being understood in a defamatory sense by persons to whom special facts are known, it is unnecessary to prove more than that there are people who knew those special facts and so might understand the words in a defamatory sense. One way of proving this proposition is to call witnesses with such knowledge and such understanding, but to say it is the only way would be to fall into the elementary error of confusing the proposition to be proved with the means of proving that proposition.

² [1929] 2 K.B. 331.

³ [1929] 2 K.B., at 337, *per* Scrutton L.J.

⁴ *Hough v. London Express Newspaper Ltd.* [1940] 2 K.B. 507.

§ 58. The Defamation Act, 1952

Hulton v. Jones added, "a terror to authorship."⁵ That terror was intensified by the decisions of the Court of Appeal in *Cassidy's* case, *Newstead's* case and *Hough's* case.⁶ "Liability for libel," said Russell L.J.,⁷ "does not depend on the intention of the defamer; but on the fact of defamation." Hence there was much complaint by authors, printers and publishers. On the other hand writers who publish statements which are *ex facie* defamatory may not unreasonably be expected to identify the party described so closely that the words cannot reasonably be interpreted as capable of referring to anyone else. If there is a risk of coincidence why should it not be borne by the party who puts the mischievous statement in circulation rather than by the innocent person to whom the words are taken to refer?⁸ But after full consideration the Porter Committee decided to recommend an alteration in the law.⁹ Their recommendation was in general accepted by Parliament after considerable discussion, and the following changes made.

Unintentional defamation

The Act of 1952, s. 4, provides that a person who has published words¹⁰ alleged to be defamatory of another person may, if he claims that the words were published by him innocently in relation to that other person, make an offer of amends. Such an offer must be expressed to be made for the purposes of this section, and must be accompanied by an affidavit specifying the facts relied upon by the person making it to show that the words in question were published by him innocently in relation to the

⁵ *Knupffer v. London Express Newspaper Ltd.* [1943] K.B. 80, 89.

⁶ Yet it is easy to exaggerate the hardships; a jury is quick to detect a "gold-digging" action. It is sometimes forgotten that the jury in *Newstead's* case gave the plaintiff one farthing damages and the C.A. refused to interfere with its verdict. See, too, *Blennerhassett v. Novelty Sales Services Ltd.* (1933) 175 L.T.J. 393 (*The Yo-yo* case) and *Progress Bars Ltd. v. Associated Newspapers Ltd.*, *The Times*, June 9, 1950 (*The Moo-Cow Milk Bar* case), each a case where plaintiffs theoretically within the protection of *Hulton v. Jones* were laughed out of court. Holdsworth thought the law could have been put on a sound basis without the intervention of Parliament: "A Chapter of Accidents in the Law of Libel" (1941) 57 L.Q.R. 74.

⁷ *Cassidy's Case* [1929] 2 K.B. at 354.

⁸ *Newstead's Case* [1940] 1 K.B. 377, 388.

⁹ Paras. 55-73.

¹⁰ This includes pictures, visual images, gestures and other methods of signifying meaning: s. 16 (1).

party aggrieved. An offer of amends shall be understood to mean an offer (i) in any case, to publish or join in the publication of a suitable correction of the words complained of, and a sufficient apology to the party aggrieved in respect of those words,¹¹ and (ii) where copies of a document or record containing the said words have been distributed by or with the knowledge of the person making the offer, to take such steps as are reasonably practicable on his part for notifying persons to whom copies have been so distributed that the words are alleged to be defamatory of the party aggrieved.

Such an offer may be either accepted or rejected. We shall indicate the statutory solution for either alternative.

(1) If the offer of amends is accepted

If the offer is accepted and duly performed, no proceedings for libel or slander shall be taken or continued by the party aggrieved against the person making the offer. This, however, is without prejudice to any cause of action against any other person jointly responsible for that publication. Any question as to the steps to be taken in fulfilment of the offer as so accepted shall in default of agreement be determined by the High Court, whose decision shall be final. Whether or not such proceedings are taken, the High Court has power, on the application of the party aggrieved, to order the person making the offer to pay to the party aggrieved costs "on an indemnity basis"¹² and any expenses reasonably incurred or to be incurred by that party in consequence of the publication in question."

(2) If the offer of amends is rejected

If the offer is not accepted by the party aggrieved, then it shall be a defence, in any proceedings for libel or slander by him against the person making the offer, to prove that the words were published by the defendant innocently in relation to the plaintiff and that the offer was made as soon as practicable after the defendant received notice that they were or might be defamatory of the plaintiff,¹³ and has not been withdrawn. But this provision

¹¹ Note that the apology need not apparently be brought to the notice of any person to whom the words complained of were published.

¹² For the intended meaning of these words, see Report of Proceedings in H.C. Sel. Cttee. B, March 4, 1952.

¹³ See *Ross v. Hopkinson* [1956] C.L.Y. 5011.

does not apply in relation to the publication by any person of words of which he is not the author unless he proves that the words were written by the author without malice. This preserves (and indeed extends) the common law rule that the malice of one defendant infects his co-defendants.¹⁴ It seems that if the editor of a newspaper publishes an anonymous letter containing statements *ex facie* innocent, but in fact not so by reason of the fact that the writer is secretly actuated by malice, the editor cannot make use of this statutory defence.

In the normal case the vital question will be whether the words have been published innocently. The Act provides that words shall be treated as having been published innocently only if either of the following conditions is satisfied:

- (i) that the publisher¹⁵ did not intend to publish them of and concerning the party aggrieved, and did not know of circumstances by virtue of which they might be understood to refer to him¹⁶; or
- (ii) that the words were not defamatory on the face of them and the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of the party aggrieved,¹⁷

and in either case that the publisher exercised all reasonable care in relation to the publication.¹⁸

Finally, it must be noticed that the facts which the publisher may adduce as evidence that the words were published innocently by him are restricted to those which he had set out in the affidavit accompanying his original offer of amends. It is therefore clear that a person who wishes to claim the protection of the Defamation Act, 1952, s. 4, must ensure that the affidavit is drafted with care. For if the party aggrieved should refuse to accept the offer of amends the defendant will be severely

¹⁴ See below, § 70.

¹⁵ This includes "any servant or agent of his who was concerned with the contents of the publication"—not, be it noted, "with the publication."

¹⁶ This meets the problem of statements not intended to refer to the plaintiff at all, as in *Hulton v. Jones* and the *Newstead* case.

¹⁷ This meets the problem of statements which are intended to refer to an existing person and are *ex facie* harmless, but by reason of facts unknown to the author or publisher are defamatory, either of the person intended to be referred to, or of some other person, as in *Cassidy's* case.

¹⁸ See *Ross v. Hopkinson* [1956] C.L.Y. 5011.

hampered at the trial if some of the facts upon which he relies to establish his innocence have been omitted from the affidavit.

§ 59. Publication

(1) Mode of publication

Publication of the defamatory statement is an essential element of the cause of action.¹⁹ It is the publication, not the composition, of a libel which is the actionable wrong. Often the person sued for publishing is not the writer. The injury done by a libel arises from the effect produced upon its readers.²⁰ Publication means the act of making the defamatory statement known to any person or persons other than the plaintiff himself.²¹ It is not necessary that there should be any publication in the popular sense of making the statement public. A private and confidential communication to a single individual is sufficient. Nor need it be published in the sense of being written or printed; for we have seen that actions as well as words may be defamatory.²² A communication to the person defamed himself, however, is not a sufficient publication on which to found civil proceedings²³; though it is otherwise in the case of a criminal prosecution, because such a communication may provoke a breach of the peace.²⁴ Nor does a communication between husband and wife amount to publication; domestic intercourse of this kind is exempt from the restrictions of the law of libel and slander.²⁵ But a statement by the defendant to the wife or husband of the plaintiff is a ground of action.²⁶ It may even be reasonable to foresee that the spouse of the plaintiff will open a letter addressed to the plaintiff.²⁷

The contents of a written document may be published either by allowing someone to read the document for himself or by reading it out to him. It is submitted, however, that this latter mode of communication amounts to slander only, and not to

¹⁹ *Powell v. Gelston* [1916] 2 K.B. 615, 619.

²⁰ *Lee v. Wilson* (1934) 51 C.L.R. 276, 287.

²¹ *Pullman v. Hill* [1891] 1 Q.B. 524, 527.

²² Above, § 53.

²³ *Powell v. Gelston* [1916] 2 K.B. 615.

²⁴ *R. v. Adams* (1888) 22 Q.B.D. 66.

²⁵ *Wennhak v. Morgan* (1888) 20 Q.B.D. 635. See below, § 62.

²⁶ *Wennman v. Ash* (1858) 13 C.B. 836.

²⁷ *Theaker v. Richardson* [1962] 1 W.L.R. 151.

libel. A defamatory statement may be published by being dictated to a clerk, shorthand writer, or other reporter who reduces it to writing, but it is submitted in this case also that such a publication amounts to slander only. There are dicta to the contrary, indeed, in certain cases²⁸ in which dictation to a clerk is said to be the publication of libel to the clerk; but it is difficult to see how A can publish to B a document which is written by B himself.²⁹ It is in any case clear that he who has been employed to print defamatory matter does not publish it merely by returning it to the author in its printed form.³⁰

Publication need not consist of a positive or overt act. If a man deliberately refrains from removing or obliterating defamatory matter on premises under his control, he may make himself responsible for its continued presence in the place where it was put. If removal or obliteration was reasonably easy he will be held to have published it. But he will not be responsible if a stranger has made it impossible or very difficult for him to put an end to the libel, as where the objectionable words have been carved deep into the stone-work of his house.³¹

(2) Persons to whom published

A publication is not sufficient unless it is made to a person who understands the defamatory significance of the statement, and who also understands that it refers to the plaintiff. Thus in *Sadgrove v. Hole*³² the defendant sent to a third person a postcard containing a defamatory statement relating to the plaintiff. The plaintiff's name, however, was not mentioned in it, and no stranger unacquainted with the circumstances would have known to whom it referred. It was held that there was no sufficient publication to the postman or other persons through whose hands the postcard passed.³³ Publication will be presumed

²⁸ *Pullman v. Hill* [1891] 1 Q.B. 524, 527, 529; *Bozsius v. Goblet Frères* [1894] 1 Q.B. 842, 844; *Marb  v. George Edwardes (Daly's Theatre), Ltd.* [1928] 1 K.B. 269, 277.

²⁹ The four preceding sentences were cited with approval by Slessor L.J. (Scrutton L.J. concurring) in *Osborn v. Thomas Boulter & Sons* [1930] 2 K.B. 226, 237.

³⁰ *Eglantine Inn Ltd. v. Smith* [1948] N.I. 29.

³¹ *Byrne v. Deane* [1937] 1 K.B. 818, 838.

³² [1901] 2 K.B. 1.

³³ No action lay for the publication to the person to whom the card was addressed, since, so far as he was concerned, the communication was privileged.

and the burden of disproving it lies upon the defendant, in all cases in which the document is so put in the way of being read and understood by someone that it is probable that he actually read and understood it. Thus it is a sufficient proof of publication to prove that a letter was posted and therefore probably read by the person to whom it was addressed or by his clerks,³⁴ or his wife,³⁵ but not his butler³⁶; or that a postcard was posted and therefore probably read by the post office officials or by the family or servants of him to whom it was sent³⁷; or that a telegram was dispatched and therefore read by the telegraph operators.³⁸

(3) Who is liable for publication

“Where defamatory matter is contained in a book, periodical, or newspaper, there are normally a series of publications each of which constitutes a separate tort. First, there is a publication by the author to the publisher, for which the author is solely liable. Secondly, there is the publication by the author and publisher jointly to the printer, for which the author and publisher are jointly liable. Thirdly, there is the publication of the printed work to the trade and the public, for which the author, publisher, and printer are jointly liable. It is normally in respect of this last publication that proceedings for libel are brought, although it is open to the plaintiff to sue in respect of the separate publications set out above.”³⁹ Everyone is responsible for the publication of a defamatory statement by another with his authority: hence a speaker who knows that his words are being reported for the public press and who expressly or implicitly authorises such a publication can be sued for libel and not merely for slander.⁴⁰ When action is brought against the person or persons primarily responsible for the publication, liability at common law is strict and absence of intention or negligence is no defence.⁴¹ Thus a publication to the wrong

³⁴ *Warren v. Warren* (1834) 1 C.M. & R. 250.

³⁵ *Theaker v. Richardson* [1962] 1 W.L.R. 151.

³⁶ *Huth v. Huth* [1915] 3 K.B. 32.

³⁷ *Robinson v. Jones* (1879) 4 L.R.Ir. 391. *Aliter* in the case of a letter in an unclosed envelope: *Huth v. Huth* [1915] 3 K.B. 32.

³⁸ *Williamson v. Freer* (1874) L.R. 9 C.P. 393.

³⁹ Porter Committee Report, s. 116.

⁴⁰ *Douglas v. Tucker* [1952] 1 D.L.R. 657.

⁴¹ See above, § 55. Now the defence provided by the Defamation Act, 1952, s. 4 (unintentional defamation), may be available.

person by mistake is a ground of action: as when a document is meant to be sent to the plaintiff himself, or to some person privileged to receive it and it is sent to someone else.⁴² So a negligent statement is actionable⁴³: as when a man making charges against the plaintiff to his very face or whilst talking scandal to his wife negligently allows what he says⁴⁴ to be overheard by a third person; or when he posts to the plaintiff himself or to a privileged person a defamatory message written on a postcard, instead of in a closed letter.

(4) Innocent dissemination

The law adopts a more lenient attitude, however, towards him who is not the printer or the first or main publisher of a libel, but has taken only a subordinate part in its dissemination—for example, a newspaper distributor or a bookseller.⁴⁵ Such a person may be held not to have published the work if he can prove that (1) he disseminated the work without knowing that it contained a libel; (2) there was nothing in the work or in the circumstances in which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel; (3) when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained a libel. It is not very easy to see the difference between the second and the third of these questions, and Scrutton L.J. expressed the opinion⁴⁶ that in order to avoid confusing the jury, “the safest course for a trial judge is to follow Bowen L.J.,⁴⁷ who is a very good man to follow,” and ask the jury simply: (i) whether the defendant knew, and (ii) whether he would have known if he had carried on his business properly.

⁴² *Hebditch v. MacIlwaine* [1894] 2 Q.B. 54, 64.

⁴³ *Shepherd v. Whitaker* (1875) L.R. 10 C.P. 502.

⁴⁴ *White v. Stone Ltd.* [1939] 2 K.B. 827. But it seems that if he has no reason to suspect that his words will be overheard there is no publication: *ibid.*, at 836. Cf. *MacNichol v. Grundy* [1932] 1 D.L.R. 225.

⁴⁵ *Bottomley v. Woolworth & Co.* (1932) 48 T.L.R. 521 (American magazines sold by multiple store). The defence, although commonly called “innocent dissemination,” is strictly a defence of “never published”: Porter Committee Report, s. 112. The defence is now available in proceedings for contempt of court: Administration of Justice Act, 1960, s. 11.

⁴⁶ In *Sun Life Assurance Co. v. W. H. Smith & Son Ltd.* (1933) 150 L.T. 211, at 214.

⁴⁷ In *Emmens v. Pottle* (1885) 16 Q.B.D. 354, 358.

Every publication a new libel

When there are several publications of the same libel a separate action lies for each publication.⁴⁸ The actions may, however, be consolidated.⁴⁹ If they are not consolidated, but tried separately, there may be difficulties about the assessment of damages.⁵⁰ This power extends to actions for slander and for slander of title and other forms of injurious falsehood.⁵¹

DEFENCES

We shall consider in detail the following six defences: (1) Justification; (2) Absolute Privilege; (3) Qualified Privilege; (4) Fair Comment; (5) Consent; (6) Apology. We have already considered the defence provided by the Defamation Act, 1952, for cases of "unintentional defamation." The question of what may be given in evidence in mitigation of damages will be considered later.⁵²

§ 60. Justification

No action will lie for the publication of a defamatory statement if the defendant pleads and proves that it is true. "For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess."⁵³ This is so even though the defendant is proved to have been actuated by malicious and improper motives. In this part of the law the interest in free speech prevails completely over the interest in security of reputation. The common law affords no protection to the man who has led a blameless and worthy life for many years but finds his youthful follies published to the world at large in gloating and accurate detail by some malicious enemy.⁵⁴ In a criminal prosecution for libel the rule is different. At common law the truth was no defence at all

⁴⁸ *Brunswick (Duke of) v. Harmer* (1849) 14 Q.B. 185; "*Truth*" (N.Z.) *Ltd. v. Holloway* [1960] 1 W.L.R. 997. For the American "single-publication" rule, see Prosser, *Topics*, Chap. 2.

⁴⁹ Law of Libel Amendment Act, 1888, s. 5.

⁵⁰ See below, § 75.

⁵¹ Defamation Act, 1952, s. 13.

⁵² See below, § 75.

⁵³ *McPherson v. Daniels* (1829) 10 B. & C. 263, at 272, *per* Littledale J.

⁵⁴ For the suggested tort of infringement of privacy, see above, § 5.

on an indictment⁵⁵; but by the Libel Act, 1843, s. 6, the publication of the truth, however defamatory, is no longer a criminal offence if the jury is of opinion that the publication of it was for the public benefit.

The defence that the statement is true is termed a plea of justification, the defendant being said to justify the publication. The burden of proof rests upon the defendant; it is for him to prove that the statement is true, not for the plaintiff to prove that it is false.⁵⁶ So the hallowed phrase in the statement of claim that the words were published "falsely and maliciously" is illogical and bad pleading.⁵⁷ The defence is a dangerous one, for an unsuccessful attempt to establish it may be treated as an aggravation of the original injury. If the statement is in fact false, it is no defence at all that the defendant honestly and on reasonable grounds believed it to be true. He who attacks the reputation of another does so at his peril; and mistake, however inevitable, is no excuse.

Literal truth unnecessary

On the plea of justification it is not necessary to prove that the statement is literally true; it is sufficient if it is true in substance, if the essence of the imputation is true and if the erroneous details in no way aggravate the defamatory character of the statement or alter its nature.⁵⁸ Thus in *Alexander v. N.E. Ry.*,⁵⁹ a statement that the plaintiff had been convicted of travelling in a train without a ticket, and had been fined one pound with *three weeks'* imprisonment in default of payment, was held capable of being sufficiently justified by proof that he had been fined one pound for that offence with a *fortnight's* imprisonment in default of payment.⁵⁹ Today, the Defamation Act, 1952, provides⁶⁰ that in an action for libel or slander in

⁵⁵ "Dost know that old Mansfield Who writes like the Bible, Says the more 'tis a truth, sir, The more 'tis a libel" (Burns, *The Reproof*). This familiar maxim is usually explained on the ground that the more truthful the statement the more likely is the person defamed to commit a breach of the peace.

⁵⁶ *Beevis v. Dawson* [1957] 1 Q.B. 195 (which see also for the practice when the plaintiff intends to give evidence in rebuttal of the plea of justification).

⁵⁷ *Duncan and Hoolahan, Defamation Practice*, pp. 24-25.

⁵⁸ *Sutherland v. Stokes* [1925] A.C. 47, 78-81.

⁵⁹ (1865) 6 B. & S. 340.

⁶⁰ s. 5.

respect of words⁶¹ containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved, if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

Rumours

When the defamatory statement is put forward by way of rumour or report only, it is not sufficient justification to prove that the rumour or report really existed; it is necessary to prove that it was true. For to give to it further currency is to suggest that it may be well founded, and it is this suggestion that must be justified. Were it not for this rule every man could escape the consequences of publishing libels and slanders by adopting the simple precaution of stating them as matters of rumour or suspicion, instead of as matters of fact.⁶² On the other hand, a statement that the Fraud Squad of the police were inquiring into the affairs of the plaintiff has been held incapable of supporting the meaning that he was guilty of fraud,⁶³ as distinct from being suspected of it, but the statement in this case was not put forward by way of rumour. It is not certain whether it is sufficient to justify a statement that a man has been warned off the turf or a boy expelled from school to prove that he has been so warned off or expelled. Greer L.J. thought that it was. "It would be an extraordinary result . . . that if you said that a properly constituted tribunal had found a man guilty of some wrongful act you could be sued for libel unless you could prove that the properly constituted tribunal had rightly decided that he was guilty."⁶⁴ But persons may be warned off or expelled for a variety of reasons, and it seems possible to place an actionable innuendo upon such a statement.⁶⁵ It is in any

⁶¹ As defined by s. 16 (1); see above, § 53.

⁶² *Watkin v. Hall* (1868) L.R. 3 Q.B. 396; *Douglas v. Tucker* [1952] 1 D.L.R. 657.

⁶³ *Lewis v. Daily Telegraph Ltd.* [1964] A.C. 234. Awards of damages amounting to £217,000 were set aside by the House of Lords as being out of all proportion, and a new trial ordered. The defendants later paid £22,000 in settlement: *The Times*, December 18, 1964.

⁶⁴ *Cookson v. Harewood* [1932] 2 K.B. 478, at 485. See also *Pritchard v. Greyhound Racing Association* (1933) 176 L.T.J. 393; 177 L.T.J. 90.

⁶⁵ *Lewis v. Daily Telegraph Ltd.* [1963] 1 Q.B. 340, 372-373 (not considered in H.L.).

event clear that to say a man has been rightly convicted is quite different from saying simply that he has been convicted: as the law stands now, someone who publishes the former statement will find himself under the heavy burden of fighting a criminal trial over again.⁶⁶

§ 61. Privilege

We have seen that in general he who publishes a defamatory statement does so at his peril, and is liable if this statement turns out not to be true, however honestly and carefully he may have acted, and however inevitable his mistake. This rule is subject to a number of important exceptions which are grouped together under the title of Privilege. A privileged statement⁶⁷ may be defined as one which is made in such circumstances as to be exempt from the rule that a man attacks the reputation of another at his own risk. In other words, privilege includes those exceptional cases in which it is not enough, in order to create liability, to prove that the defendant has published a false and defamatory statement. The defendant, being privileged,⁶⁷ is not responsible for this alone, but is either wholly free from responsibility or is liable only on proof that he was animated by a malicious motive and not by any genuine intention to use his privilege for the purpose for which the law gave it to him. The cases in which privilege exists are, speaking generally, those in which there is some just occasion for publishing defamatory matter in the public interest or in the furtherance or protection of the rights or lawful interests of individuals. In such cases the exigency of the occasion amounts to a lawful excuse for the attack so made upon the plaintiff's reputation. The right of free speech is allowed wholly or partially to prevail over the right of reputation. If the defamatory statement can be shown to be true, the defence of privilege is not required; for it is allowable to publish the truth on all occasions, privileged or not, and from all motives, good or bad. It is only when the statement is

⁶⁶ See *Hinds v. Sparks*, *The Times*, July 27, 1964.

⁶⁷ This, though a common expression, is not strictly correct. "Really it is the occasion which is privileged, though it is natural enough to speak of the privilege as belonging to the defendant who wishes to avail himself of the doctrine"; *Minter v. Priest* [1930] A.C. 558, at 571-572, *per* Lord Dunedin. The argument of Holmes, K.C., in *Perera (M. G.) v. Peiris* [1949] A.C. 1 reviews the history of the defence.

false, or cannot be proved to be true, that it is necessary to fall back upon the plea of privilege, and to prove that the occasion of the publication was such as to exempt the defendant from the consequences of his error. It has been held that a defendant may plead that the occasion on which he published the words was privileged, even though he also denies that he ever published the words in question.⁶⁸ Whenever privilege exists, however, it is wise to plead it instead of or along with a plea of justification; for the latter is a dangerous weapon, which often fails and even injures him who uses it.

§ 62. Absolute Privilege

Privilege is of two kinds, distinguished as absolute and qualified. A statement is said to be absolutely privileged when it is of such a nature that no action will lie for it, however false and defamatory it may be, and even though it is made maliciously—that is to say, from some improper motive. The right of free speech is allowed to prevail wholly over the right of reputation. These cases are at the opposite extreme from the ordinary cases of unprivileged defamation. When a statement is not privileged, it is actionable, however honest its publication may have been; but if it is absolutely privileged, it is not actionable, however dishonest its publication may have been. As may be expected, the cases in which the right of free speech can be placed at so high a level are few in number and quite exceptional in character.

They are the following:

- (1) Any statement made in the course of and with reference to judicial proceedings by any judge, juryman, party, witness, or advocate;
- (2) Fair, accurate, and contemporaneous reports of public judicial proceedings published in a newspaper;
- (3) Any statement made in Parliament by a member of either House;
- (4) Parliamentary papers published by the direction of either House, and any republication thereof by any person in full;
- (5) Any statement made by one officer of State to another in the course of his official duty;
- (6) Communications between husband and wife.

⁶⁸ *Kirkwood Hackett v. Tierney* [1952] I.R. 185: *sed quaere*.

(1) Judicial privilege

“The authorities establish beyond all question this: that neither party, witness, counsel, jury, nor judge can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any court recognised by law, and this though the words written or spoken were written or spoken maliciously without any justification or excuse, and from personal ill-will and anger against the person defamed. This absolute privilege has been conceded on the grounds of public policy to ensure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them.”⁶⁹ The privilege extends to all courts, superior and inferior, civil and military.⁷⁰ But if the court is an inferior one privilege probably attaches only when the court has acted within jurisdiction.⁷¹ The privilege also extends to tribunals acting in a manner similar to courts of justice, so that Jasper Addis unsuccessfully argued that an order of the Disciplinary Committee set up by the Solicitors Act, 1957, was not absolutely privileged.⁷² This privilege was not even destroyed by the fact that the tribunal in question (unlike ordinary courts) sat in private. But the privilege does not extend to officials possessing merely administrative as opposed to genuine judicial functions. Thus a meeting of a local authority engaged in hearing applications for music and dancing licences is not a court within the meaning of the rule,

⁶⁹ *Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson* [1892] 1 Q.B. 431, at 451, *per Lopes L.J.*

⁷⁰ *Scott v. Stansfield* (1868) L.R. 3 Ex. 220 (county court); *Thomas v. Churton* (1862) 2 B. & S. 475 (coroner); *Dawkins v. Rokeby (Lord)* (1873) L.R. 8 Q.B. 255 (court-martial); *Law v. Llewellyn* [1906] 1 K.B. 487 (magistrate); *Bottomley v. Brougham* [1908] 1 K.B. 584 (official receiver).

⁷¹ See below, § 167.

⁷² *Addis v. Crocker* [1961] 1 Q.B. 11. But a complaint to the Bar Council (as distinct from the Benchers of an Inn) has only qualified privilege: *Lincoln v. Daniels* [1962] 1 Q.B. 237.

and statements made by a member of that body are not absolutely privileged.⁷³ The privilege extends not merely to judges⁷⁴ but witnesses,⁷⁵ parties,⁷⁶ and advocates.⁷⁷ It includes not merely statements made by a witness in court but also statements made by him to a party, or to the party's solicitor, in the course of preparation for trial.⁷⁸ For it would not be of much use to grant absolute privilege to what is said in court, if a plaintiff could say: "I cannot sue you for what you said in the witness-box, but I am going to sue you for what you told your solicitor you were going to say in it."

The statement, in order to be privileged, need not be relevant, in the sense of having a material bearing upon the matter in issue in the case. Thus the statement of a witness is privileged, even though inadmissible as evidence, and even though so immaterial that no prosecution for perjury would be possible in respect of it. Nevertheless the statement, though it need not be relevant in this sense, must, it would seem, be made in the course of and with reference to the case in hand. A judge who from the Bench made a defamatory observation in respect of some entirely extraneous matter would no longer be speaking in his capacity as a judge, and would have no privilege.⁷⁹

(2) Privileged reports

By the Law of Libel Amendment Act, 1888, s. 3, it is provided that "A fair and accurate⁸⁰ report in any newspaper⁸¹ of proceedings publicly heard before any court exercising judicial

⁷³ *Royal Aquarium Society v. Parkinson* [1892] 1 Q.B. 481.

⁷⁴ *Scott v. Stansfield* (1868) L.R. 3 Ex. 220. In the case of judges, however, this is simply a special instance of a much more general rule of exemption from civil liability for judicial acts. As to this, see below, § 167.

⁷⁵ *Seaman v. Netherclift* (1876) 2 C.P.D. 58. Nor will an action for perjury lie against a witness: *Hargreaves v. Bretherton* [1959] 1 Q.B. 45. See above, § 4.

⁷⁶ *Kennedy v. Hilliard* (1859) 10 Ir.C.L.R. 195.

⁷⁷ *Munster v. Lamb* (1889) 11 Q.B.D. 588.

⁷⁸ *Watson v. M'Ewan* [1905] A.C. 480.

⁷⁹ *More v. Weaver* [1928] 2 K.B. 520, 525.

⁸⁰ It is no defence that the omission of a material statement during the proceedings was due to its not being heard by the reporter owing to inattention: *Mitchell v. Hirst, Kidd and Rennie Ltd.* [1936] 3 All E.R. 872. Lawrence J. there suggested during argument that it would have been otherwise if the omitted statement could not have been heard.

⁸¹ As defined in s. 1. A broadcast report is also protected: the Defamation Act, 1952, s. 9 (2).

authority⁸² shall, if published contemporaneously with such proceedings, be privileged: provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter." The report need not be a verbatim one; it is enough if it is in substance a fair account of what took place; a few slight omissions or inaccuracies are immaterial.⁸³ Nor is a newspaper obliged to verify whether what counsel or a solicitor or a witness has said is accurate; a fair and accurate report of counsel's opening address in (say) a fashionable libel action is just as much entitled to privilege as such a report of the judge's summing-up.⁸⁴ "Proceedings" covers anything done in the course of the proceedings which is in any way related to them,⁸⁵ but not an intervention in court which is wholly irrelevant to anything before the tribunal.⁸⁶ It is generally understood that the word *privileged* in this section means absolutely privileged.⁸⁷ If any of the conditions mentioned in this section are absent a report of judicial proceedings possesses at the most a merely qualified privilege.⁸⁸

(3) Parliamentary privilege

"It is clear that statements made by members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person."⁸⁹

The privilege is based on the Bill of Rights, 1689, s. 1.

⁸² Within the United Kingdom only: the Defamation Act, 1952, s. 8. Reports of proceedings before foreign and Commonwealth tribunals may be the subject of qualified privilege: see below, § 66.

⁸³ *Kimber v. Press Association* [1893] 1 Q.B. 65.

⁸⁴ *Burnett & Hallamshire Fuel Ltd. v. Sheffield Telegraph & Star Ltd.* [1960] 1 W.L.R. 502.

⁸⁵ *Farmer v. Hyde* [1937] 1 K.B. 728.

⁸⁶ *Lynam v. Gowing* (1880) 6 L.R.Ir. 259.

⁸⁷ See Gatley, *Libel*, p. 302; Pollock, *Torts*, p. 204; Winfield, *Tort*, p. 628; Spencer Bower, *Actionable Defamation*, pp. 406-408 ("anything more unjust or pernicious or inimical to public welfare cannot well be imagined"). This seems to be the assumption of the Defamation Act, 1952, s. 8.

⁸⁸ Below, § 66.

⁸⁹ *Ex p. Wason* (1869) L.R. 4 Q.B. 573, at 576, *per* Cockburn C.J. See *Perera v. Peiris* [1949] A.C. 1; *Chenard & Co. v. Arissol* [1949] A.C. 127; Davis, "Parliamentary Broadcasting and the Law of Defamation" (1948) 7 Univ. of Toronto L.J. 385.

(4) Parliamentary papers

By the Parliamentary Papers Act, 1840, absolute privilege is conferred upon the publication by order of either House of Parliament of the reports, papers, votes, or proceedings of either House, and also upon the republication in full of any documents of this nature which have been already published by such authority. At common law the protection accorded to statements made in Parliament did not extend to the publication of defamatory documents elsewhere, even by order of one of the Houses⁹⁰; and this Act was passed to alter the law in this respect.⁹¹

(5) Official privilege

No action will lie against an officer of State for any defamatory statement made by him to another officer of State in the course of his duty. This was laid down by the Court of Appeal in *Chatterton v. Secretary of State for India*,⁹² in which an official communication made by the Secretary of State for India to the Under-Secretary for the purpose of enabling the latter to answer a question in the House of Commons was held absolutely privileged. It has not been established clearly what classes of public servants are officers of State. Protection has been extended to official reports made by a military officer to his superior,⁹³ by a Minister to a subordinate official,⁹⁴ and by the High Commissioner of a Commonwealth country to his Prime Minister,⁹⁵ but it is doubtful whether it extends to a report made by a police-inspector to his superior officer.⁹⁶ The truth is that this absolute immunity is "given only where upon clear grounds of public policy a remedy must be denied to private injury because complete freedom from suit appears indispensable to the

⁹⁰ *Stockdale v. Hansard* (1839) 9 A. & E. 1.

⁹¹ The Defamation Act, 1952, s. 9, extends the protection of the Act to broadcast statements. The publication of extracts from or abstracts of parliamentary papers is the subject of qualified privilege only. See *Associated Newspapers Ltd. v. Dingle* [1964] A.C. 371, 389, 407.

⁹² [1895] 2 Q.B. 189.

⁹³ *Dawkins v. Lord F. Paulet* (1869) L.R. 5 Q.B. 94. The authority of the case is weakened by Cockburn C.J.'s powerful dissenting judgment.

⁹⁴ *Peerless Bakery Ltd. v. Watt* [1955] N.Z.L.R. 339. Cf. *Henn-Collins J. in Szalatnay-Stacho v. Fink* [1946] 1 All E.R. 303, 305 (the point was not discussed in the C.A.).

⁹⁵ *Isaacs & Sons Ltd. v. Cook* [1925] 2 K.B. 391.

⁹⁶ *Merricks v. Nott-Bower* [1965] 1 Q.B. 57.

effective performance of judicial, legislative or official functions. The presumption is against such a privilege and its extension is not favoured.”⁹⁷ The question arises whether privilege would attach to statements made in this country by the officials of a foreign government. It would seem that if such protection were accorded it would be on the grounds of diplomatic privilege, whereas the rule attaching privilege to the communications of our own officials is based on public policy. The Court of Appeal in *Szalatnay-Stacho v. Fink*⁹⁸ was doubtful whether such statements would ever be protected by absolute (as distinct from qualified) privilege, unless, as in the exceptional circumstances of that case, the sender of the document and the foreign government were both resident in England. The fact that a communication relates to commercial matters does not of itself preclude it from being one relating to State matters.⁹⁹

(6) Statements between husband and wife

A defamatory statement made by one spouse to the other cannot be the subject of an action. The older authorities put this upon the ground that there has been no publication; but it seems preferable today, when the fiction of the unity of husband and wife has been discarded, to say that it is an instance of absolute privilege, the reason for which is the highly confidential character of the relationship.¹

If the occasion be covered by absolute privilege then consequential communications also are privileged in the same way. So, in *Isaacs & Sons Ltd. v. Cook*,² the publication of the report to the clerks and servants through whom the production and issue of the report were arranged was privileged along with the report itself.³

⁹⁷ *Gibbons v. Duffell* (1932) 47 C.L.R. 520, per Gavan Duffy C.J., Rich and Dixon JJ. A more lenient view was taken by a majority of the U.S. Supreme Court in *Barr v. Mateo* (1958) 360 U.S. 564. This privilege must be distinguished from the evidentiary privilege which enables a Minister to refuse to produce a document if it would be contrary to the public interest to do so.

⁹⁸ [1947] K.B. 1.

⁹⁹ *Isaacs & Sons Ltd. v. Cook* [1925] 2 K.B. 391; *Pearless Bakery Ltd. v. Watt* [1955] N.Z.L.R. 399.

¹ Prosser, *Torts*, p. 805.

² [1925] 2 K.B. 391.

³ Cf. cases of qualified privilege, below, § 69.

§ 63. Qualified Privilege

When an occasion of qualified privilege exists a person (provided he is not actuated by malice) is entitled to make defamatory statements about another. The right of freedom of speech prevails over the right of reputation, but only to a limited extent. The statement must be made honestly and without any indirect or improper motive. Qualified privilege, therefore, is an intermediate case between total absence of privilege and the presence of absolute privilege. The principle which determines whether any particular occasion is privileged was thus expounded by Parke B. in *Toogood v. Spyring*⁴: the statement is protected if it is "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." No complete list of such occasions is possible or desirable,⁵ but it is generally agreed that the chief instances of qualified privilege are the following:—

- (1) Statements made in the performance of a duty;
- (2) Statements made in the protection of an interest;
- (3) Reports of parliamentary, judicial, and certain other public proceedings;
- (4) Professional communications between solicitor and client.

We shall now consider each in turn.

§ 64. (1) Statements in Performance of a Duty

A statement is conditionally privileged if it is made in the performance of any legal or moral duty imposed upon the person making it,⁶ provided that the person to whom the statement is made has a corresponding interest or duty to receive it. This

⁴ (1834) 1 C.M. & R. 181, at 193.

⁵ *London Association for Protection of Trade v. Greenlands* [1916] 2 A.C. 15, 28.

⁶ *Stuart v. Bell* [1891] 2 Q.B. 341.

reciprocity is essential.⁷ "This is not to say that both parties must have a duty or both an interest: one may have an interest and the other a duty, as in the common case of a servant's character."⁸ The duty need not be, and indeed seldom is, one enforceable at law⁹; it is sufficient that by the moral standard of right conduct prevalent in the community the defendant lay under an obligation to say what he did. It is not enough that he believed himself to be under such an obligation.¹⁰ It is for the judge, and not for the jury, to decide whether on the facts as proved such a duty existed.¹¹ The judge will have to estimate the value of and make a choice between the various interests—of life, family, reputation, or property—involved in the case.¹² It is plain that no universally valid criterion is possible. "Would the great mass of right-minded men in the position of the defendant have considered it their duty, under the circumstances, to make the communication?" was the test suggested by Greer L.J.¹³ One important kind of duty which will give privilege to a defamatory statement is the duty of answering inquiries made by some person having a lawful interest in the matter. Thus an employer may answer questions as to the character of a former servant made by any person proposing to engage that servant.¹⁴ So an accusation of crime is privileged if made in reply to questions put by the police with a view to detecting an offender.¹⁵

Voluntary communications

A communication which is volunteered, without any inquiry on the part of anyone possessing a lawful interest, is unprivileged, unless there is some such confidential or other relation between the parties as creates a duty to speak without being asked. Thus the relation of master and servant will justify the servant in

⁷ *Watt v. Longsdon* [1930] 1 K.B. 130.

⁸ *Phelps v. Kemsley* (1942) 168 L.T. 18, at 21, per Goddard L.J.

⁹ An example of a duty enforceable by law is the duty imposed by s. 228 of the Merchant Shipping Act, 1894, on the master of a ship to record in the log any case where he leaves a seaman behind and the reason: *Moore v. Canadian Pacific S.S. Co.* [1945] 1 All E.R. 128, 133.

¹⁰ *Phelps v. Kemsley* (1942) 168 L.T. 18.

¹¹ *Watt v. Longsdon* [1930] 1 K.B. 130.

¹² See Gatley, *Libel*, pp. 226–253.

¹³ *Watt v. Longsdon* [1930] 1 K.B. at 153.

¹⁴ *Jackson v. Hopperton* (1864) 16 C.B.(N.S.) 829.

¹⁵ *Kine v. Sewell* (1838) 3 M. & W. 297.

telling his master facts which concern his interest in relation to the matters entrusted to the servant.¹⁶ For the same reason a father or other near relative may warn a lady as to the character of the man whom she proposes to marry.¹⁷ It would seem that there may even be circumstances in which a duty lies upon a third party to communicate to one spouse the delinquencies of the other, but in such cases the judge, as Scrutton L.J. said in *Watt v. Longsdon*,¹⁸ would be "much influenced by the consideration that as a general rule it is not desirable for anyone, even a mother-in-law, to interfere in the affairs of man and wife." Again, a host owes a duty to his guest which will justify him in warning his guest against a servant suspected of dishonesty.¹⁹ So the members of borough councils and other public bodies and officials of trading companies are privileged in respect of communications made to one another in the honest fulfilment of their functions.²⁰ On the same principle, in the case of a trade protection association whose business it is to make on behalf of its members inquiries into the financial position of persons with whom they propose to deal, communications made by the association or its agents to a member who has requested this information, and who has a lawful interest in obtaining it, are privileged.²¹

§ 65. (2) Statements in Protection of an Interest

Even when there is no duty to make the statement, it is nevertheless privileged if it is made in the protection of some lawful interest of the person making it: for example, if it is made in the defence of his own property or reputation.²² But here also there must be reciprocity. There must be an interest to be protected on the one side and a duty to protect it on the

¹⁶ *Lawless v. Anglo-Egyptian Cotton Co.* (1869) L.R. 4 Q.B. 262.

¹⁷ *Todd v. Hawkins* (1837) 8 C. & P. 88.

¹⁸ [1930] 1 K.B. 130, at 150.

¹⁹ *Stuart v. Bell* [1891] 2 Q.B. 341.

²⁰ *Andrews v. Nott Bower* [1895] 1 Q.B. 888; *Watt v. Longsdon* [1930] 1 K.B. 130.

²¹ *London Association for Protection of Trade v. Greenlands Ltd.* [1916] 2 A.C. 15. It seems impossible to reconcile this decision with the earlier decision of the Privy Council in *Macintosh v. Dun* [1908] A.C. 390: see Winfield, *Tort*, p. 639.

²² *Turner v. M.-G.-M. Pictures Ltd.* [1950] 1 All E.R. 449, 470.

other.²³ Thus in *Adam v. Ward*²⁴ the plaintiff, in the House of Commons, had made against General Scobell charges of the most wounding character. General Scobell, as he was compelled to do by King's Regulations, referred the matter to the Army Council, which after investigation found that the attack was unjustifiable. It ordered the defendant, its secretary, to publish in the newspapers a letter to General Scobell vindicating him and also containing statements defamatory of the plaintiff. The House of Lords held that the occasion of this publication was privileged,²⁵ and that the privilege was not destroyed either by the number of people whom the publication might reach,²⁶ or by reason of the fact that it contained matter defamatory of the plaintiff, for where the defendant's character has been publicly attacked by the plaintiff, the courts will not be over-nice in their scrutiny of the language which he uses in his defence.

There may sometimes be a common interest in and reciprocal duty in respect of the subject-matter of the communication.²⁷ Thus a master has a sufficient interest in the honesty of his servants to be privileged in warning them against the character of their associates.²⁸ So a tenant may make a complaint to his landlord of the conduct of persons engaged by the latter to effect repairs to the premises.²⁹ Conversely, a landlord may complain to his tenant of the conduct of the latter's lodgers at the windows of the house as having a tendency to bring the house into disrepute.³⁰ So shareholders in the same company

²³ *White v. Stone Ltd.* [1939] 2 K.B. 827, 835. It is, however, impossible by making a mistake to create the occasion for making a privileged statement: *Davidson v. Barclays Bank* [1940] 1 All E.R. 816; *Pyke v. Hibernian Bank* [1950] I.R. 195.

²⁴ [1917] A.C. 309.

²⁵ "Every subject of the Crown, whatever position of our far-flung Empire he may inhabit, has, and must have, an interest in the British Army, its courage, the confidence of its men in their officers, its discipline and efficiency. . . . It would be a disgrace and injury to the Service if a man, publicly accused of the shameful breach of duty of which General Scobell was accused, was allowed to continue in command of a brigade in the Army unless and until he had been cleared of the accusation made against him. Every subject, therefore, who had an interest in the Army had an interest in being by a public communication informed of General Scobell's acquittal": *per* Lord Atkinson, at 343.

²⁶ See below, § 69.

²⁷ *Watt v. Longsdon* [1930] 1 K.B. 130, 147.

²⁸ *Hunt v. Gt. N. Ry.* [1891] 2 Q.B. 189.

²⁹ *Toogood v. Spyring* (1834) 1 C.M. & R. 181.

³⁰ *Knight v. Gibbs* (1834) 1 Ad. & E. 43.

may make privileged communications to each other in defence and furtherance of their common interests.³¹

Charges against public servants

The same principle is applicable even when the interest of the defendant is merely the general interest which he possesses in common with all others in the honest and efficient exercise by public officials of the duties entrusted to them. Thus any member of the public may make charges of misconduct against any public servant and the communication will be privileged³²; but the charge must be made to the proper persons—that is to say, to those who have a corresponding interest. So a constituent may write to his Member of Parliament asking for his assistance to bring to the notice of the appropriate Minister a complaint of improper conduct on the part of a public officer, for example, a police officer or a justice of the peace, acting in his constituency in relation to his office.³³ A communication to the wrong person,³⁴ and *a fortiori* a publication of the complaint to the world at large in a newspaper or otherwise, is an excess of privilege, and the privilege will be thereby forfeited.³⁵ On the other hand, the Defamation Act, 1952, provides³⁶ that a defamatory statement published by or on behalf of a candidate in any election to a local government authority³⁷ or to Parliament shall not be deemed to be published on a privileged occasion on the ground that it is material to a question in issue in the election, whether or not the person by whom it is published is qualified to vote at the election.

Privilege distinguished from fair comment

This privilege of making complaints against public officials must not be confounded with the right to make fair comments on

³¹ *Lawless v. Anglo-Egyptian Cotton Co.* (1869) L.R. 4 Q.B. 262. Cf. *Bridgman v. Stockdale* [1953] 1 W.L.R. 704 (invigilator and examination candidates).

³² *Harrison v. Bush* (1855) 5 E. & B. 344.

³³ *R. v. Rule* [1937] 2 K.B. 375.

³⁴ *De Buse v. McCarthy* [1942] 1 K.B. 156.

³⁵ *Purcell v. Sowler* (1878) 2 C.P.D. 215; *Truth (N.Z.) Ltd. v. Holloway* [1960] N.Z.L.R. 69 (not discussed on appeal, [1960] 1 W.L.R. 997).

³⁶ s. 10. This reverses the decision of the Court of Appeal in *Braddock v. Bevins* [1948] 1 K.B. 580.

³⁷ *Plummer v. Charman* [1962] 1 W.L.R. 1460.

matters of public interest, which will be discussed in a later section.³⁸ Privilege deals with false and defamatory statements of fact, not with defamatory comment on proved or admitted facts. A comment may be published to all the world; a specific charge of misconduct may be published only to the persons in authority over the offender.

§ 66. (3) Privileged Reports

Fair and accurate reports, whether in a newspaper or elsewhere, of the public proceedings of any court of justice are conditionally privileged by the common law. The privilege extends to all courts, whether superior or inferior, and whether courts of record or not.³⁹ It makes no difference whether the proceedings are preliminary or final,⁴⁰ or whether they are taken *ex parte* or otherwise. The privilege is not excluded by the fact that the matter is one over which the court had no jurisdiction, provided that it has jurisdiction to inquire whether the matter is one which it could properly entertain.⁴¹ A fair and accurate contemporaneous report of judicial proceedings before a foreign tribunal is privileged if the matter is of legitimate and proper interest to the English public.⁴² It seems, however, that no privilege attaches if the proceedings take place in a court to which the public are not admitted,⁴³ or in a domestic tribunal, *e.g.*, the stewards of the Jockey Club,⁴⁴ nor where the subject-matter of the publication is an obscene or blasphemous libel.⁴⁵ As has been already indicated,⁴⁶ a *newspaper* report of judicial proceedings is the subject of a statutory privilege, probably

³⁸ Below, § 71.

³⁹ *e.g.*, a coroner's court: *McCarey v. Associated Newspapers Ltd.* [1964] 1 W.L.R. 855.

⁴⁰ *Kimber v. Press Association* [1893] 1 Q.B. 65.

⁴¹ *Allbutt v. General Council of Medical Education* (1889) 23 Q.B.D. 400.

⁴² *Webb v. Times Publishing Co. Ltd.* [1960] 2 Q.B. 535. See the interesting Note on this case in (1964) 64 Col.L.Rev. 1102.

⁴³ *Kimber v. Press Association* [1893] 1 Q.B. 65.

⁴⁴ *Chapman v. Ellesmere (Lord)* [1932] 2 K.B. 431, 475. But privilege attaches to the publication of a decision of such a tribunal, in the terms in which the tribunal bona fide embodied it, in the publication chosen by the parties as the means of communication between the tribunal and the section of the public interested. This is merely an application of the rule *volenti non fit injuria*. In such a case the plaintiff cannot rely upon an innuendo: *ibid.* [1932] 2 K.B. 431.

⁴⁵ *R. v. Carlile* (1819) 8 B. & Ald. 167.

⁴⁶ Above, § 62.

absolute, if it fulfils the requirements of section 8 of the Law of Libel Amendment Act, 1888. If any of those requirements are not satisfied, the report is subject to the common law rule of qualified privilege only. Fair and accurate reports of parliamentary debates are covered by qualified privilege at common law,⁴⁷ whilst the publication of extracts from or abstracts of reports or papers ordered by Parliament to be published is the subject of qualified privilege by statute.⁴⁸

Reports of public meetings

At common law the reports, whether in a newspaper or elsewhere, of the proceedings of public meetings possessed no privilege.⁴⁹ Then the Law of Libel Amendment Act, 1888, s. 4, gave a limited measure of protection to newspapers which published fair and accurate reports of certain meetings. The Porter Committee recommended⁵⁰ that the defence should be extended, both by widening the definition of "newspaper" to include monthly journals as well as those published at shorter intervals and by extending the categories of reports entitled to such privilege so as to give effect to the changes in social, economic, and political conditions which had occurred during the preceding sixty years.

Accordingly the Defamation Act, 1952,⁵¹ provides that the publication in a newspaper⁵² of the reports or other matters about to be mentioned shall be the subject of qualified privilege. The reports and matters concerned fall into two categories:

(1) *Statements privileged without any explanation or contradiction.*

(2) *Statements privileged subject to explanation or contradiction.*

The defence of qualified privilege is not available to an action brought in respect of the publication of any of the

⁴⁷ *Wason v. Walter* (1868) L.R. 4 Q.B. 73.

⁴⁸ Above, § 62.

⁴⁹ *Purcell v. Sowler* (1877) 2 C.P.D. 215.

⁵⁰ Paras. 95-111.

⁵¹ s. 7.

⁵² Means any paper containing public news or observations thereon, or consisting wholly or mainly of advertisements, which is printed for sale and is published in the United Kingdom either periodically or in parts or numbers at intervals not exceeding 36 days. Broadcast statements are also protected: s. 9 (2).

statements mentioned in this second category if it is proved that the defendant had been requested by the plaintiff to publish in the newspaper in which,⁵³ or, in the case of a broadcast statement, in the manner in which,⁵⁴ the original publication was made a reasonable letter or statement by way of explanation or contradiction,⁵⁵ and has refused or neglected to do so, or has done so in a manner not adequate or reasonable having regard to all the circumstances.⁵⁶ The Act does not protect the publication of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit.⁵⁷ This limitation is important: the legislature never intended to extend protection to reports of defamatory remarks which have no relevance to the objects of the meeting.⁵⁸ Although the report must be fair and accurate it need not be *verbatim*; nor, provided it is substantially accurate, will minor errors deprive it of protection.⁵⁹

(1) *Statements privileged without any explanation or contradiction*

- (i) A fair and accurate report of any proceedings in public of the legislature⁶⁰ of any part of Her Majesty's dominions⁶¹ outside Great Britain.

⁵³ This must mean an issue of the newspaper subsequent to that in which the original publication was made.

⁵⁴ If the libel was contained in a variety sketch, or interview, it would hardly be necessary to reassemble the original cast: Chapman, *Statutes*, p. 295.

⁵⁵ A general demand by the plaintiff for an apology is not a request within the meaning of this section: *Khan v. Ahmed* [1957] 2 Q.B. 149.

⁵⁶ The reason for the distinction has been explained by Professor E. C. S. Wade (66 L.Q.R. 351): "It is surely not appropriate to require of editors when reporting overseas news . . . that they should throw their columns open to overseas statesmen or litigants, say in Australia or the United States, who may claim the right to refute or explain derogatory statements made in the English press. On the other hand, in the cases of statements falling into the second category, especially reports of proceedings of domestic tribunals and meetings of local authorities, a correction or explanation may go a long way towards meeting any slur which may have been cast upon the plaintiff." See *Khan v. Ahmed* [1957] 2 Q.B. 149.

⁵⁷ s. 7 (3). Nor does it limit or abridge any privilege subsisting (otherwise than by virtue of s. 4 of the Law of Libel Amendment Act, 1888, which is repealed) immediately before the Act.

⁵⁸ *Pankhurst v. Sowler* (1887) 3 T.L.R. 193.

⁵⁹ *Nowlan v. Moncton Publishing Co.* [1952] 4 D.L.R. 808.

⁶⁰ In relation to any territory comprised in Her Majesty's dominions which is subject to a central and a local legislature, means either of those legislatures.

⁶¹ Means the whole of any territory within those dominions which is subject to a separate legislature.

- (ii) A fair and accurate report of any proceedings in public of an international organisation of which the United Kingdom or Her Majesty's Government in the United Kingdom is a member, or of any international conference to which that government sends a representative.
- (iii) A fair and accurate report of any proceedings in public of an international court.⁶²
- (iv) A fair and accurate report of any proceedings before any court exercising jurisdiction throughout any part of Her Majesty's dominions outside the United Kingdom or of any proceedings before a court-martial held outside the United Kingdom under the Naval Discipline Act, the Army Act, or the Air Force Act.
- (v) A fair and accurate report of any proceedings in public of a body or person appointed to hold a public inquiry by the government or legislature of any part of Her Majesty's dominions outside the United Kingdom.
- (vi) A fair and accurate copy of or extract from any register kept in pursuance of any Act of Parliament which is open to inspection by the public, or of any document which is required by the law of any part of the United Kingdom to be open to inspection by the public.
- (vii) A notice or advertisement published by or on the authority of any court within the United Kingdom or any judge or officer of such a court.

(2) Statements privileged subject to explanation or contradiction

- (i) A fair and accurate report of the findings or decision of any of the following associations, or any committee or governing body thereof, that is to say—
 - (a) an association formed in the United Kingdom for the purpose of promoting or encouraging the exercise of or interest in any art, science, religion or learning, and empowered by its constitution to exercise control over or adjudicate upon matters

⁶² Means the International Court of Justice or any other judicial or arbitral tribunal deciding matters in dispute between States. Judicial proceedings in a foreign court may have qualified privilege at common law: above, n. 42.

of interest or concern to the association or the actions or conduct of any persons subject to such control or adjudication;

- (b) an association formed in the United Kingdom for the purpose of promoting or safeguarding the interests of any trade, business, industry or profession, or of the persons carrying on or engaged in any trade, business, industry or profession, and empowered by its constitution to exercise control over or adjudicate upon matters connected with the trade, industry, business or profession, or the actions or conduct of those persons;
- (c) an association formed in the United Kingdom for the purpose of promoting or safeguarding the interests of any game, sport or pastime to the playing or exercise of which members of the public are invited or admitted, and empowered by its constitution to exercise control over or adjudicate upon persons connected with or taking part in the game, sport or pastime,

being a finding or decision relating to a person who is a member or is subject by virtue of any contract to the control of the association.

- (ii) A fair and accurate report of the proceedings at any public meeting held in the United Kingdom, that is to say, a meeting bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission to the meeting is general or restricted.⁶³
- (iii) A fair and accurate report of the proceedings at any meeting or sitting in any part of the United Kingdom of—
 - (a) any local authority⁶⁴ or committee of a local authority or local authorities;
 - (b) any justice or justices of the peace acting otherwise than as a court exercising judicial authority;
 - (c) any commission, tribunal, committee or person

⁶³ See *Khan v. Ahmed* [1957] 2 Q.B. 149.

⁶⁴ Means any authority or body to which the Public Bodies (Admission to Meetings) Act, 1960, applies. Note that this Act confers qualified privilege on the communication of agenda to committee members.

appointed for the purposes of any inquiry by Act of Parliament, by Her Majesty or by a Minister of the Crown;

(d) any person appointed by a local authority to hold a local inquiry in pursuance of any Act of Parliament;

(e) any other tribunal, board, committee or body constituted by or under, and exercising functions under, an Act of Parliament,

not being a meeting or sitting admission to which is denied to representatives of newspapers and other members of the public.

(iv) A fair and accurate report of the proceedings at a general meeting of any company or association constituted, registered or certified by or under any Act of Parliament or incorporated by Royal Charter, not being a private company within the meaning of the Companies Act, 1948.

(v) A copy or fair and accurate report or summary of any notice or other matter⁶⁵ issued for the information of the public by or on behalf of any Government Department, officer of State, local authority or chief officer of police. This privilege protects only the newspaper publishing the notice and does not cover the source from which the newspaper obtained its information.⁶⁶

§ 67. (4) Professional Communications

Confidential communications between solicitor and client are privileged. The foundation of the privilege is the importance in the interests of justice that such communications should be free and unfettered by any fear of the consequences. The privilege is limited to the legal profession and covers all professional communications passing for the purpose of getting or giving

⁶⁵ The notice may be oral: *Loveday v. Sun Newspapers* (1938) 59 C.L.R. 503 ("Hand-out").

⁶⁶ *Foster v. Watson* (1944) 44 S.R.(N.S.W.) 399. Jordan C.J. stated that the privilege covered only "statements of a genuinely official nature formally issued for the information of the public and that it does not apply to mere interesting gossip supplied to journalists by the publicity officer of a Ministry for the purpose of keeping his Minister and his Minister's department prominently in the public eye."

professional advice,⁶⁷ and exists even if the solicitor does not accept the retainer.⁶⁸ The communication must be such as, within a very wide and generous ambit of interpretation, is fairly referable to the relationship of solicitor and client.⁶⁹ Thus the privilege is not confined to litigation: even conversations between a solicitor and client relating to the business of obtaining a loan for the deposit on the purchase of real estate are protected, as the business is professional business within the ordinary scope of a solicitor's employment.⁶⁸ It is probable that this is an instance of qualified, not absolute, privilege, though in *More v. Weaver*,⁷⁰ where the plaintiff was not represented by counsel, the Court of Appeal held it to be absolute. But in *Minter v. Priest*⁷¹ the House of Lords expressly reserved opinion upon the point. This privilege must be distinguished from the privilege in the law of evidence which entitles a litigant, or a party to impending litigation, to object to an order for the production on discovery of a document on the ground that it is a professional communication.⁷²

§ 68. Malice

The defence of qualified privilege is not available if the defendant was actuated by malice. Malice means the presence of an improper motive: it does not necessarily mean personal spite or ill-will. A statement is malicious when it is made for some purpose other than the purpose for which the law confers the privilege of making it. If the occasion is privileged it is for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive.⁷³ It is neither necessary nor sufficient to constitute liability that the statement was made without reasonable and probable cause. Not necessary—for if the statement is made maliciously, and is in fact false, the defendant is

⁶⁷ *Minter v. Priest* [1930] A.C. 558, 581.

⁶⁸ [1930] A.C. 558, 584.

⁶⁹ *Minter v. Priest* [1930] A.C. 558, 568.

⁷⁰ [1928] 2 K.B. 520. In *Groom v. Crooker* [1939] 1 K.B. 194, the C.A. treated the privilege as qualified.

⁷¹ [1930] A.C. 558.

⁷² As in *Schneider v. Leigh* [1955] 2 Q.B. 195.

⁷³ *Clark v. Molyneux* (1877) 3 Q.B.D. 244, 246; *Royal Aquarium Co. v. Parkinson* [1892] 1 Q.B. 481, 484.

liable for it although he had good grounds for believing it to be true; malice destroys the privilege, and leaves the defendant subject to the ordinary law by which a mistake, however reasonable, is no defence. Neither is the absence of reasonable and probable cause sufficient in itself to constitute liability. The law requires that a privilege shall be used honestly but not that it shall be used carefully. Negligence in making defamatory statements on a privileged occasion is not actionable.⁷⁴ The absence of any genuine belief in the truth of the statement is conclusive proof of malice, for the defendant cannot have had a proper motive in saying what he did not believe to be true.⁷⁵ On the other hand, a genuine belief in the truth of the statement is quite consistent with the existence of malice. A man's motive for publishing a libel on a privileged occasion may be an improper one, even though he believes the statement to be true. If he uses the occasion for a malicious purpose he will be liable, even though he said what he believed to be true: to avoid liability he must have said it for the purpose for which the law allows such a statement to be made.⁷⁶ The burden of proof lies upon the plaintiff, and the judge has to be satisfied that there is some reasonable evidence of malice to go to the jury.⁷⁷ "If, however, the plaintiff can show any example of spite or indirect motive, whether before or after the publication, he will establish his case provided that the examples given are so connected with the state of mind of the defendant as to lead to the conclusion that he was malicious at the date when the libel was published . . . each piece of evidence must be regarded separately, and, even if there are a number of instances where a favourable attitude is shown, one case tending to establish malice would be sufficient evidence on which a jury could find for the plaintiff.

⁷⁴ *Clark v. Molyneux* (1877) 3 Q.B.D. 244; *Moore v. Canadian Pacific S.S. Co.* [1945] 1 All E.R. 128, 133.

⁷⁵ *Stewart v. Biggs* [1928] N.Z.L.R. 673. Save, indeed, in those exceptional cases in which a man may be under a duty to make some statement or communication, irrespective of whether he personally believes it to be true or not. His duty may make the truth of the matter no concern of his: *British Railway Traffic Co. v. The C. R. C. Co.* [1922] 2 K.B. 260, 271.

⁷⁶ *Winstanley v. Bampton* [1943] 1 All E.R. 661, 664 (not reported in [1943] K.B. 819).

⁷⁷ *Jenoure v. Delmege* [1891] A.C. 73. The plaintiff may find the task of proving malice a difficult one since R.S.C., Ord. 82, r. 6, abolished (on the recommendation of the Porter Committee) the power to administer interrogatories as to the sources of the defendant's information or belief. See below, § 72.

Nevertheless, each particular instance of alleged malice must be carefully analysed, and if the result is to leave the mind in doubt, then that piece of evidence is valueless as an instance of malice whether it stands alone or is combined with a number of similar instances.”⁷⁸

Evidence of malice

This may be either intrinsic or extrinsic. Intrinsic evidence consists in the contents of the statement itself. Its language, for example, may be so violent or insulting—it may go so far beyond the just requirements of the occasion—as to amount in itself to sufficient evidence of malice.⁷⁹ But when considering whether the actual expressions used can be held as evidence of express malice no nice scales should be used.⁸⁰ The defendant will be protected even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might honestly and on reasonable grounds have believed that what he wrote or said was true and necessary for his purpose, even though in fact it was not so.⁸¹ Otherwise the protection which the law throws over a privileged occasion would be largely defeated. For the fact that the defendant has been unreasonable does not mean that he has been malicious. “It is, I think, difficult for the uninstructed mind to guard against such a misconception, and to my mind the clearest direction is necessary to the effect that irrationality, stupidity or obstinacy do not constitute malice, though in an extreme case they may be some evidence of it.”⁸²

Extrinsic evidence consists in the circumstances under which the statement was made—circumstances which go to show that the statement, even though moderate and justifiable in its language, was in reality animated by some improper motive. It

⁷⁸ *Turner v. M.-G.-M. Pictures Ltd.* [1950] 1 All E.R. 449, at 455, per Lord Porter. If the case is tried with a jury the judge has a discretion to entertain and rule on a submission made by the defendant at the close of the plaintiff's case that there is no evidence to go to the jury without putting him to his election whether he will or will not call evidence: *Young v. Rank* [1950] 2 K.B. 510.

⁷⁹ *Loughton v. Bishop of Sodor and Man* (1872) L.R. 4 P.C. 495, 505.

⁸⁰ *Turner v. M.-G.-M. Pictures Ltd.* [1950] 1 All E.R. 449, 470.

⁸¹ *Adam v. Ward* [1917] A.C. 309, 339.

⁸² *Turner v. M.-G.-M. Pictures Ltd.* [1950] 1 All E.R. 449, at 463, per Lord Porter. See the similar rule in Fair Comment, below, § 72.

is not necessary that the plaintiff should prove affirmatively what this improper motive really was; it is sufficient to disprove the existence of a proper motive: for example, by showing that the defendant had no genuine belief in the truth of the statement.⁸³ Again, the behaviour of the defendant or his witnesses at the trial may be some evidence of malice, but the judge should tell the jury whether they would be justified in coming to such a conclusion.⁸⁴

§ 69. Excess of Privilege

Privilege is forfeited if it is exceeded—that is to say, if the publication of the defamatory statement is more extensive than the occasion of the privilege requires and justifies. The question whether privilege has been exceeded is distinct from the question of whether there is evidence of malice. It is also a question of law for the court and not of fact for the jury.⁸⁵ Certain forms of privilege, indeed, permit of publication to the whole world: for example, the reports of judicial proceedings. Privilege such as this cannot be exceeded in the sense now under consideration. So “where a man, through the medium of Hansard’s reports of the proceedings in Parliament, publishes to the world vile slanders of a civil, naval, or military servant of the Crown in relation to the discharge by that servant of the duties of his office, he selects the world as his audience, and it is the duty of the heads of the service to which the servant belongs . . . to publish his vindication to the same audience to which his traducer has addressed himself.”⁸⁶ “Do what you will, the stern chase after a lie that has got the start is apt to be a long one.”⁸⁷ But in other cases the privilege is limited to publication to certain persons only; and any disregard, whether intentional or negligent, of the limits thus imposed is termed an excess of privilege, and deprives the defendant of the benefit of it.⁸⁸ Thus a message

⁸³ *Clark v. Molyneux* (1877) 3 Q.B.D. 237, 245; *Watt v. Longsdon* [1930] 1 K.B. 130.

⁸⁴ *Turner v. M.-G.-M. Pictures Ltd.* [1950] 1 All E.R. 449, 469.

⁸⁵ *Adam v. Ward* [1917] A.C. 309, 318, 320–321, 327, 348.

⁸⁶ *Adam v. Ward* [1917] A.C. at 343, per Lord Atkinson.

⁸⁷ *Ibid.*, per Lord Dunedin at 324.

⁸⁸ There is another use sometimes made of the phrase “excess of privilege” in which it means, not an excessive publication of a privileged statement, but the improper and malicious use of that privilege. In this latter sense

which would have been privileged had it been sent in a closed letter was unprivileged because sent by telegraph, for it was thereby published to the telegraph operator.⁸⁹ Similarly, a publication to a person who is mistakenly believed to be privileged to receive the communication is an excess of privilege.⁹⁰

Newspapers in no special position

This question often arises in relation to charges made in newspapers against public men. If such a charge is solely an assertion of fact, so that the defence of fair comment is not open, a defendant newspaper which is unable or unwilling to justify its allegations sometimes pleads privilege. The privilege is said to be created by the interest which the public at large have in hearing the details of such a charge against such a person. Now the common law does not recognise any special privilege as attaching to the profession of journalism.⁹¹ A journalist who obtains information reflecting on a public man has no more right than any other private citizen to publish his assertions to the world at large; such assertions are not privileged merely because the general topic developed in the article is of public interest.⁹² It will be otherwise, of course, if the assertion is contained in a fair and accurate report of a public meeting or a judicial proceeding.⁹³ "It may be true in one sense to say that [newspapers] owe a duty to their readers to publish any and every item of news that may interest them. But this is not such a duty as makes every communication in their paper relating to a matter of public interest a privileged one. If it were, the power of the press to libel public men with impunity would in the absence of malice be almost unlimited."⁹⁴ So in *Chapman*

evidence of excess means merely evidence of malice: see Lord Porter in *Turner v. M.-G.-M. Pictures, Ltd.* [1950] 1 All E.R. 449, at 462.

⁸⁹ *Williamson v. Freer* (1874) L.R. 9 C.P. 893.

⁹⁰ *Hebditch v. MacIlwaine* [1894] 2 Q.B. 54.

⁹¹ *Truth (N.Z.) Ltd. v. Holloway* [1960] N.Z.L.R. 60, 83.

⁹² *Truth (N.Z.) Ltd. v. Holloway* [1960] N.Z.L.R. 69. (The ruling was not challenged on appeal to the J.C.: [1960] 1 W.L.R. 997.)

⁹³ See above, § 62.

⁹⁴ *Chapman v. Ellesmere (Lord)* [1932] 2 K.B. 481, at 474-475, *per* Romer L.J. See *Russell v. Norfolk (Duke of)* [1949] 1 All E.R. 109; *Green v. Blake* [1948] I.R. 242; Lloyd, "The Disciplinary Powers of Professional Bodies" (1950) 18 M.L.R. 281, 297-299.

v. *Lord Ellesmere*⁹⁵ it was held that as the law then stood⁹⁶ *The Times* newspaper (as distinct from the *Racing Calendar*) was not protected by privilege when it published a decision of the Stewards of the Jockey Club, although it was an accurate report of the decision.

Presence of uninterested persons

No publication, however, which is reasonably necessary for the effective use of the defendant's privilege amounts to an excess of it. Thus a company sending letters and telegrams on a privileged occasion to another company carrying on business abroad was not liable for publishing those letters and telegrams to its own servants in the ordinary way of business.⁹⁷ So a solicitor writing a defamatory letter on behalf of his client does not exceed his privilege by publishing the letter in the ordinary course of business to his clerks.⁹⁸ But in a business communication containing a very serious allegation against a man's character more care ought to be taken in limiting the communication to the higher officials of a firm than in writing an ordinary business letter.⁹⁹ Again, in *Toogood v. Spyring*,¹ in which Parke B. gave his classic exposition of the nature of a privileged occasion, the court held that, when the defendant charged the plaintiff (who was employed by him) in the presence of a third person with having broken open a cellar door when drunk, the occasion was privileged. The business of life could not well be carried on if such restraints were imposed on these communications. As the plaintiff has an interest in hearing the charges made against him there can be no doubt that the occasion is privileged, even though the statement is made to the plaintiff

⁹⁵ [1932] 2 K.B. 431.

⁹⁶ The report would now be privileged under the Defamation Act, 1952: see above, § 66.

⁹⁷ *Edmondson v. Birch & Co. Ltd.* [1907] 1 K.B. 371. The earlier case of *Pullman v. Hill* [1891] 1 Q.B. 524, must now be regarded as nothing more than a decision that on the particular facts of the case the communication to the defendants' clerks was not necessary or in the ordinary course of business: *Osborn v. Thomas Boulter & Son* [1930] 2 K.B. 226, 233, per Scrutton L.J.

⁹⁸ *Boxsius v. Goblet Frères* [1894] 1 Q.B. 842.

⁹⁹ *Roff v. British and French Chemical Co.* [1918] 2 K.B. 677, 684.

¹ (1834) 1 Cr.M. & R. 181.

himself and so could not by itself have given him a cause of action.²

§ 70. Joint Liability

It is clear that the agents through whom a person properly publishes a privileged communication are themselves covered by the like privilege: for example, a printer who prints a privileged document, the printing of which is not an excess of privilege, or a solicitor who in the course of his duty towards his client publishes a statement which that client is privileged to publish.³ It is not so clear what the position is if one (or more) of the co-defendants is inspired by malice. Does this defeat the privilege of his co-defendants? The earlier case of *Smith v. Streetfield*,⁴ in which it was held that it did, has been over-ruled by *Egger v. Chelmsford (Viscount)*,⁵ in which four of the eleven defendants to a libel action against whom malice had not been found appealed successfully against a judgment that they were infected by the malice of the other seven defendants. The four successful appellants each had an original privilege of his own, distinct from that of the others, and it is not certain that the result would be the same if this were not so. Probably it would be held that in no case ought the innocent parties to a joint publication be affected by the malice of the malicious party.⁶

§ 71. Fair Comment

A fair comment on a matter which is of public interest or is submitted to public criticism is not actionable. This right is one of the aspects of the fundamental principle of freedom of

² It is submitted that the decision of the Court of Appeal to the contrary in *White v. Stone (J. & F.), Ltd.* [1939] 2 K.B. 827, is based upon a mistaken view of the authorities: see Goodhart, "Defamatory Statements and Privileged Occasions" (1940) 56 L.Q.R. 262.

³ *Baker v. Carrick* [1894] 1 Q.B. 838.

⁴ [1913] 3 K.B. 764.

⁵ [1965] 1 Q.B. 248. Yet it is worth noting that the House of Commons specifically refused to accept the recommendation of the Porter Committee (paras. 127-132) to abolish the rule in *Smith v. Streetfield*: see H.C. Deb. Sel. Cttee. B., March 6, 1952. But we are now told that "we have come after several years to find that the law is as Lord Porter's Committee recommended it should be": [1965] 1 Q.B. 248, at 265, *per* Lord Denning M.R.

⁶ *Egger v. Chelmsford* [1965] 1 Q.B. 248, 263.

expression, and the courts are zealous to preserve it unimpaired.⁷ But comment or criticism must be carefully distinguished from a statement of fact. The former is not actionable if it relates to a matter which is of public interest; the latter is actionable, even though the facts so stated would, if true, have possessed the greatest public interest and importance. Comment or criticism is essentially a statement of opinion as to the estimate to be formed of a man's writings or actions. Being therefore a mere matter of opinion, and so incapable of definite proof, he who expresses it is not called upon by the law to justify it as being true, but is allowed to express it, even though others disagree with it, provided that it is honest.

Nature of defence

Salmond held the view that fair comment is simply an instance of qualified privilege.⁸ Although this view has the support of Willes J.,⁹ there is considerable judicial authority in favour of another view, which may be expressed as follows: The defence of fair comment is a denial of the libel, a traverse of the allegation in the statement of claim¹⁰; the defence of privilege is an admission of the libel, but a claim that it was published in such circumstances as afford the defendant an immunity from the ordinary consequences of publishing a libel, a plea in confession and avoidance. "A privileged occasion is one on which the privileged person is entitled to do something which no one who is not within the privilege is entitled to do on that occasion. A person in such a position may say or write about another person things which no other person in the kingdom can be allowed to say or write. But, in the case of a criticism upon a published work, every person is entitled to do and is forbidden to do exactly the same things, and therefore the occasion is not privileged."¹¹ Therefore, the question to be put to the jury is, not whether the article is privileged, but whether it is or is not a libel.

⁷ *Kemsley v. Foot* [1951] 2 K.B. 34, 46-47. See the history of the defence discussed by Diplock, K.C., in [1952] A.C. 345, 349.

⁸ 6th ed., s. 145 (9).

⁹ *Henwood v. Harrison* (1872) L.R. 7 C.P. 606, 625.

¹⁰ *Peter Walker & Son Ltd. v. Hodgson* [1909] 1 K.B. 239, 250.

¹¹ *Merivale v. Carson* (1887) 20 Q.B.D. 275, at 280, *per* Lord Esher.

Fair comment sui generis

It is true that in *Merivale v. Carson*, Bowen L.J. thought the question "rather academical than practical,"¹² but that must be taken merely to refer to the case then before the court. For if fair comment is no libel, the absence of malice should afford no defence if the comment is unfair; conversely the presence of malice should raise no liability if the comment is fair.¹² There is much to be said in favour of that opinion. If there are two criticisms of a book by different writers, both couched in similar terms, and each being on its face fair comment, it seems difficult to say that one exceeds the limit of fair comment because the writer of it is actuated by malice against the author, whereas the other does not exceed those limits because the writer is not so actuated. But such is now the law. The Court of Appeal held in *Thomas v. Bradbury, Agnew & Co. Ltd.*,¹³ and it has since been accepted in the House of Lords,¹⁴ that express malice will destroy a plea of fair comment. It does not, however, follow that fair comment is merely one branch of qualified privilege. Round what is the privilege thrown, comment or only fair comment? If all comment be privileged, then honest belief would be a good defence to an action in respect of a comment *prima facie* unfair. No one has yet suggested that this is the law. It would be manifestly absurd. But if the privilege is thrown only round fair comments, and the presence of malice prevents a comment from being fair, there is no need to talk of privilege at all; or, if we needs must, the privilege is absolute, not qualified. In any event there are two admitted differences between the defence of fair comment and the defence of qualified privilege. If the publication was upon a privileged occasion, the burden is upon the plaintiff to prove express malice; the defendant, on the other hand, has first the burden of showing that a comment is fair before the burden of proving malice is cast back upon the plaintiff. On the other hand, the plaintiff who has submitted his work or his acts to public criticism bears the onus of proving that a *prima facie* protected occasion is not in fact protected,

¹² 20 Q.B.D., at 283.

¹³ [1906] 2 K.B. 627. According to Winfield, *Tort*, p. 619, this was the only successful libel action ever brought against the publishers of *Punch*. See the interesting account of the case by defendants' counsel, A. Birrell, *Things Past Redress* (1937), pp. 161-162.

¹⁴ *Sutherland v. Stopes* [1925] A.C. 47, 63-64.

whereas the defendant who relies upon a qualified privilege has affirmatively to prove the existence of the privilege.¹⁵ Again, some instances of abuse of privilege (*e.g.*, excessive publication) can have no application to the defence of fair comment. The analogy between the defences of qualified privilege and fair comment is indeed far from close. It seems, contrary to the opinion of Salmond,¹⁶ that the defence of fair comment is *sui generis*, and not merely a particular instance of qualified privilege.

§ 72. Elements of Fair Comment

The defence has three elements. It must be shown that the words complained of are (1) comment, (2) fair comment, and (8) fair comment on a matter of public interest.

(1) Comment and fact

It is essential to the plea of fair comment that the defamatory matter must appear on the face of it to be a comment and not a statement of fact. To come within a plea of fair comment the facts on which the comment is based must be stated or referred to and the imputation must appear as an expression of the defendant's opinion on those facts. It is a question for the jury (subject to the direction of the judge) whether the words, on their true construction in their context, amount to a positive statement of fact or an expression of opinion or inference. If they are the former they must be justified. Sometimes it is difficult to distinguish fact from comment or to decide how far the facts upon which comment is made have been set out or referred to in the alleged libel. In *Kemsley v. Foot*¹⁷ the respondents had published an attack upon the conduct of one of Lord Beaverbrook's newspapers, with which the appellant, also a newspaper proprietor, had no connection, under

¹⁵ *Thomas v. Bradbury, Agnew & Co.* [1906] 2 K.B. 627, 640.

¹⁶ So also F. R. Y. Radcliffe, "The Defence of Fair Comment" (1907) 23 L.Q.R. 97, and Collins M.R. in *Thomas v. Bradbury, Agnew* [1906] 2 K.B. 627, 641. The judgment of Collins M.R. does not really face the difficulty. He seems to assume that the presence of malice has "distorted" (p. 638) or "warped" (p. 642) the defendant's judgment, although he admits that it is "possible for a person to have a spite against another and yet to bring a perfectly dispassionate judgment to bear upon his literary merits." It is this latter case which really raises the problem.

¹⁷ [1952] A.C. 845.

the heading "Lower than Kemsley." It was argued that the plea of fair comment (as distinct from justification) was not open to the respondents because the subject-matter on which the comment "Lower than Kemsley" ¹⁸ was made was not indicated with sufficient particularity. But the House of Lords held that a sufficient substratum of fact could be found or indicated in the words complained of, namely, that Lord Kemsley was the active proprietor of and responsible for the Kemsley Press, which had a wide public circulation.¹⁹

The task of the critic in such a case would be impossible if he had to set out in detail the facts upon which his criticism was based. It is true that not all of those to whom the libel has been published will have read for themselves the issues of the periodical in question, but "its contents and conduct are open to comment on the ground that the public have at least the opportunity of ascertaining for themselves the subject-matter on which the comment is founded."²⁰ A similar principle applies to literary and artistic works submitted to the public: a critic is not shut out from the defence of fair comment because he has confined his remarks on, say, the first night of a new play to the words "This is a disgraceful production."²¹

(2) Fair comment on facts truly stated

Here there are three points to be considered: (i) the facts must be truly stated; (ii) the comment must be honest; (iii) imputations of corrupt or dishonourable motives must be warranted by the facts.

(i) *The facts must be truly stated*

The comment must not misstate facts: no comment can be fair which is built upon facts which are invented or misstated.²²

¹⁸ "It is not in my opinion a statement of fact that a newspaper is low: it is a comment. It may be a statement of fact to say that a man is fraudulent, for there is a legal sanction for fraud, but there is no legal sanction for publishing low newspapers": Lord Oaksey at 361.

¹⁹ The proceedings were eventually compromised: *The Times*, June 26, 1952. [1952] A.C. 945, at 355-356, per Lord Porter.

²⁰ *McQuire v. Western Morning News* [1903] 2 K.B. 100 is a good illustration of this. The defendant will of course have to supply particulars of the facts on which he relies before trial; but he is not required to justify them all: see below, n. 34.

²¹ *Hunt v. Star Newspaper Ltd.* [1908] 2 K.B. 309, 317, 320; *Kemsley v. Foot* [1952] A.C. 345.

As Sir Alexander Cockburn C.J. once said: "To say that you may first libel a man, and then comment upon him is obviously absurd."²³ So when in a review of a play the defendant stated falsely that it contained an incident of adultery, his plea of fair comment failed.²⁴ Originally it was necessary to show that every statement of fact in the words complained of (however minor or unimportant) was true. But now the Defamation Act, 1952, s. 6, provides that in an action for libel or slander in respect of words²⁵ consisting partly of allegations of fact and partly of expressions of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved. It has been argued that this section has made a radical change in the law by conferring immunity in respect of unproved allegations of fact if the allegations of fact which are proved are sufficient to support the comment. This was certainly not what the Porter Committee intended,²⁶ but it may well be what Parliament intended,²⁷ although whether it has succeeded in carrying that intention into effect is another matter. It is submitted that it has not,²⁸ and the defence of fair comment still protects only the comment, and not unjustified statements of fact.

The rolled-up plea. In view of the distinction thus drawn between comment and matter of fact, and in view of the circumstance that comment and fact are so frequently combined in the same statement, the plea of fair comment used to be formulated as to justify at the same time the statements of fact thus included in the allegations complained of. The usual form of such a plea was that "in so far as the statements complained of are statements of fact they are true in substance and in fact, and in so far as they consist of comment they are fair comment on a matter of public interest." Such a plea, known as the "rolled-up plea,"

²³ *R. v. Carden* (1879) 5 Q.B.D. 1, at 8.

²⁴ *Merivale v. Carson* (1887) 20 Q.B.D. 275.

²⁵ As defined in s. 16 (1): see above, § 53.

²⁶ See para. 87 of the Report.

²⁷ See Standing Committee B., H.C. Deb., March 6, 1952, col. 208, and Gatley, *Libel*, pp. 345-346; *Anders v. Gas* [1960] C.I.Y. 1790.

²⁸ *Truth (N.Z.) Ltd. v. Avery* [1959] N.Z.L.R. 274; *Broadway Approvals Ltd. v. Odhams Press Ltd.* [1965] 1 W.L.R. 805.

was a plea of fair comment only, and not of justification coupled with a plea of fair comment.²⁹ "The averment that the facts were truly stated is merely to lay the necessary basis for the defence on the ground of fair comment. This averment is quite different from a plea of justification of a libel on the ground of truth, under which the defendant has to prove not only that the facts are truly stated, but also that any comments upon them are correct."³⁰ Although this plea was not regarded by the courts with favour it was much used, for the defendant could not be compelled to give particulars of the facts which he proposed to prove at the trial in support of his plea.³¹ But in 1949 the Rules of Court were amended in accordance with a recommendation of the Porter Committee to provide that in such a case the defendant shall furnish "particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true."³² And it has been held³³ that the plaintiff is also entitled to such particulars if the defendant does not plead the "rolled-up plea" but only the general plea of fair comment.³⁴

Comment and privileged statements of fact. If a statement of fact is itself privileged, and the subject-matter is one which is open to comment, the plea of fair comment is not excluded by the circumstance that the statement of fact on which the comment proceeds is erroneous. For example, he who comments on the statements contained in the judgment of a court of justice, or made by a witness in the box,³⁵ or contained in a parliamentary

²⁹ *Sutherland v. Stopes* [1925] A.C. 47.

³⁰ *Ibid.* at 62-63, *per* Lord Finlay.

³¹ For this would have been an indirect way of compelling him to specify which of the statements complained of were statements of fact and which expressions of opinion, and this is a question to be decided by the jury.

³² R.S.C., Ord. 82, r. 8.

³³ *Cunningham-Howie v. Dimbleby Ltd.* [1951] 1 K.B. 360.

³⁴ The defendant is not required to prove the truth of every fact so adduced: it is enough if he can establish sufficient facts to support the comment to the satisfaction of the jury: *Kemsley v. Foot* [1952] A.C. 345. "It is one thing to publish a defamatory statement of fact; it is quite another to allege a defamatory statement of fact in a pleading in order to show that a public comment was fair": *ibid.* at 361, *per* Lord Oaksey. See now the Defamation Act, 1952, s. 6.

³⁵ *Grech v. Odhams Press Ltd.* [1958] 2 Q.B. 275, 285.

paper,³⁶ may plead fair comment, although the statements are mistaken.

(ii) *The comment must be honest*

The comment must be honestly believed to be true, and not inspired by any malicious motive. It is now settled since the decision of the Court of Appeal in *Thomas v. Bradbury, Agnew & Co.*³⁷ that a comment which is objectively and prima facie fair may become unfair if made with a malicious motive. The absence of any genuine belief in the truth of the comment is conclusive proof of malice, for no man can have a proper motive for making defamatory statements which he does not believe to be justified. Even a comment genuinely believed to be true, however, will be actionable as unfair if it is inspired by any improper and malicious motive. It is sometimes said that comment is also to be classed as unfair, even in the absence of any dishonesty or malice, if the critic fails to show a certain degree of moderation, judgment and competence.³⁸ It is said that there is a certain measure of violence or perverseness on the part of a critic which will itself condemn his criticism as unfair and actionable. But this is not so. To apply any such test would mean that any jury would be at liberty to find a comment unfair simply because they did not agree with it and thought it unduly severe: it is of the highest importance to the community that the critic of literary or artistic matters should not have his work judged by the standard of "the man on the Clapham omnibus."³⁹ The violence, exaggeration or perverseness of a critic has not in itself any operation in making his criticism unfair, but is merely evidence that his criticism is not honest or that it is inspired by malice. "The question which the jury must consider is this: would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised?"⁴⁰ In *Turner*

³⁶ *Mangena v. Wright* [1909] 2 K.B. 958.

³⁷ [1906] 2 K.B. 627.

³⁸ *Wason v. Walter* (1868) L.R. 4 Q.B. 73, 96.

³⁹ *McQuire v. Western Morning News* [1903] 2 K.B. 100, 109; *Turner v. M.-G.-M. Pictures Ltd.* [1950] 1 All E.R. 449, 475.

⁴⁰ *Merivale v. Carson* (1887) 20 Q.B.D. 275, at 281, per Lord Esher. See also *Lyon v. Daily Telegraph* [1948] K.B. 746, 754; *Silkin v. Beaverbrook Newspapers Ltd.* [1958] 1 W.L.R. 748.

v. *M.-G.-M. Pictures Ltd.*⁴¹ Lord Porter said he would adopt these words, "except that I would substitute 'honest' for 'fair' lest some suggestion of reasonableness instead of honesty should be read in."

(iii) *Imputations of corrupt motives*

A man's moral character is not a permissible subject of adverse comment, and this is so even though the person attacked occupies some public position which makes his character a matter of public interest. He who says or suggests that a person is dishonest, corrupt, immoral, untruthful, inspired by base and sordid motives, must either justify his accusation by proving it to be true, or show that the imputation is a correct inference from the facts commented on.⁴² It may be fair comment mistakenly to accuse an author of folly, but not to accuse him of vice; of want of dignity, but not of want of honesty; of incapacity, but not of corruption; of bad taste, but not of mendacity. This important limitation upon the right of criticism was established by the decision of the Court of Queen's Bench in *Campbell v. Spottiswoode*,⁴³ in which it was held actionable to suggest, however honestly, that the editor of a religious magazine, in advocating a scheme for missions to the heathen, was in reality an impostor inspired by motives of pecuniary gain. Such comment goes outside the realm of criticism of the plaintiff in relation to the book, its subject-matter, or the plaintiff as an author.⁴⁴ "A

⁴¹ [1950] 1 All E.R. at 461. In *Lea v. Justice of the Peace Ltd. (sub nom. Privacy and the Press*, Butterworths, 1947) there is a valuable discussion between Hilbery J. and Sir Valentine Holmes, K.C., on the scope of the defences of justification and fair comment. "Holmes: I have always thought that it is a tremendous misfortune, especially when you are trying to deal with lay clients, that a plea of fair comment is called fair comment, because it is so difficult to make a person understand that a comment which they think is grossly unfair may nevertheless be perfectly fair comment for the purpose of establishing a defence. Hilbery: It is easy for the lay mind to think that by 'fair comment' you mean 'moderate comment.' Holmes: Quite, my Lord."

⁴² But the "private life of a Member of Parliament may be material to his fitness to occupy his public office": *Lyle-Samuel v. Odhams Ltd.* [1920] 1 K.B. 135, at 146, *per* Scrutton L.J. And literary productions can be criticised for their treatment of life and morals as freely as for bad writing: *Kemsley v. Foot* [1952] A.C. 345, 356.

⁴³ (1863) 3 B. & S. 769; 32 L.J.Q.B. 185. See also *Hunt v. Star Newspaper Co.* [1908] 2 K.B. 809; *Dakhyl v. Labouchère* [1908] 2 K.B. 325n.; *Gardiner v. Fairfax (John) & Sons Pty. Ltd.* (1942) S.R.(N.S.W.) 171.

⁴⁴ *Wilson v. Manawatu Daily Times Co. Ltd.* [1957] N.Z.L.R. 735, 742.

writer in a public paper," said Sir Alexander Cockburn C.J.,⁴⁵ *arguendo*, "may comment on the conduct of public men in the strongest terms; but if he imputes dishonesty, he must be prepared to justify." In his judgment he reasserted the point. "It seems to me that a line must be drawn between hostile criticism on a man's public conduct and the motives by which that conduct may be supposed to be influenced; and that you have no right to impute to a man in his conduct as a citizen—even though it be open to ridicule or disapprobation—base, sordid, dishonest and wicked motives, unless there is so much ground for the imputation that a jury shall be of opinion, not only that you may have honestly entertained some mistaken belief upon the subject, but that your belief is well founded and not without cause."⁴⁶ Such a personal attack, therefore, is to be regarded as a defamatory statement of fact, and not as a mere comment. Accordingly it will not be covered by a plea of fair comment, unless it is a correct inference from the facts commented on. It is not a sufficient defence (as in other forms of defamatory comment) that the statement has been honestly, even though erroneously, made as a fair comment on a matter of public interest; but it is a good defence under a plea of fair comment (without any separate plea of justification) that the statement is a correct inference warranted by the facts commented on.⁴⁷ "Any other interpretation," said Fletcher Moulton L.J. in *Hunt v. The Star Newspaper Co.*,⁴⁸ "would amount to saying that, where facts were only sufficient to raise a suspicion of a criminal or disgraceful motive, a writer might allege such motive as a fact and protect himself under the plea of fair comment. No such latitude is allowed by English law."

(3) What matters may be commented on

The right of comment is universal; there is full liberty to criticise all men and things, public and private, provided that the criticism is honest. Further, everyone is entitled to comment. A newspaper reporter or editor has the same rights as a

⁴⁵ *Campbell v. Spottiswoode* (1863) 32 L.J.Q.B. at 196.

⁴⁶ 32 L.J.Q.B. at 199. The report in 3 B. & S. at 776 is slightly different.

⁴⁷ *Dakhyl v. Labouchère* [1908] 2 K.B. 325n., 329, *per* Lord Atkinson. But Gately, *Libel*, pp. 338–339, argues that it is enough if the imputation is one which could reasonably be drawn from facts truly stated.

⁴⁸ [1908] 2 K.B. 309, at 320.

private citizen, neither more nor less, so it does not matter whether the comment appears in a Sunday newspaper with an enormous circulation or in a private letter.⁴⁹ But it is only in a limited class of cases that there is any right to express one's own opinion honestly and fearlessly regardless of whether others can be induced to agree with it or not. The cases in which this right exists may be divided into two classes—namely, (i) matters of public interest; and (ii) matters which, although of no public interest, have been submitted to criticism by the persons concerned. In all other cases the defendant will be liable unless he can prove that the alleged libel is true not only in its allegations of fact but also in any comments made thereon.⁵⁰ He must justify both the facts and the comment.

(i) *Matters of public interest*

For example, the administration of justice,⁵¹ the affairs of Parliament, the conduct of the government and of public servants,⁵² the mode in which local authorities and other public bodies perform their functions,⁵³ the management of public institutions,⁵⁴ or of a private business of large extent,⁵⁵ the conduct of public worship in the Church of England.⁵⁶ It makes no difference that the public interest in the matter in question is limited to a particular locality, instead of extending throughout the realm. That which is primarily of public interest to the citizens of Manchester is indirectly of public interest to all England.⁵⁷

⁴⁹ *Silkin v. Beaverbrook Newspapers Ltd.* [1958] 1 W.L.R. 743, 746. See also above, § 69.

⁵⁰ *Sutherland v. Stopes* [1925] A.C. 47, 62. "But that is not very good English, because I do not think a comment can ever be said to be true. It can only be said to be justified": Holmes, K.C., *arguendo* in *Lea v. Justice of the Peace Ltd.* (1947), *sub nom. Privacy and the Press*, 165. "True comment" presumably means comment which in the opinion of the court is warranted by the facts and well founded.

⁵¹ *Hibbins v. Lee* (1864) 4 F. & F. 243 (conduct of magistrates). The law relating to contempt of court should here be borne in mind.

⁵² *Henwood v. Harrison* (1872) L.R. 7 C.P. 606.

⁵³ *Purcell v. Sowler* (1877) 2 C.P.D. 215.

⁵⁴ *Cox v. Feeney* (1863) 4 F. & F. 13, 20.

⁵⁵ *South Hetton Coal Co. v. N. E. News Association Ltd.* [1894] 1 Q.B. 133 (housing conditions provided by plaintiffs for 2,000 employees).

⁵⁶ *Kelly v. Tinling* (1865) L.R. 1 Q.B. 699.

⁵⁷ *Purcell v. Sowler* (1877) 2 C.P.D. 215, 218.

(ii) *Matters submitted to public criticism by the persons concerned*

He who voluntarily gives up his right of privacy by submitting himself or his deeds to public scrutiny and judgment must submit to the exercise of a right of public comment. This right, therefore, extends to books and every form of published literature, works of art publicly exhibited, and public musical or dramatic performances.⁵⁸ It should be noted that works of criticism are themselves submitted to public scrutiny and their subject-matter and style may thus in turn be criticised.⁵⁹ So also with any form of appeal to the public, such as advertisements, circulars, or public speeches. So it would seem that, whilst men in public life have to submit to being caricatured, persons in private life are protected from this form of annoyance.⁶⁰

Burden of proof

The burden of proving that a comment is fair is on the defendant. He must establish that the facts upon which the comment is based are true, and that the comment thereupon is warranted in the sense that it is such as might be made by an honest man. Once the defendant has established that in this sense the comment is fair, the onus is shifted to the plaintiff if he wishes to prove that the *prima facie* protection is displaced by the presence of malice in the defendant.⁶¹

It is a question for the jury whether the words are statements of fact or expressions of opinion, and if the latter whether they are fair or not. But it is for the judge to decide in the first place (1) whether the words are capable of being statements of fact, (2) whether the subject is one which is in law open to comment, and (3) whether there is any reasonable evidence to go to the jury that the comment is unfair.⁶²

⁵⁸ *Turner v. M.-G.-M. Pictures Ltd.* [1950] 1 All E.R. 449 (insensitive but honest comment on broadcast by film critic).

⁵⁹ *Turner v. M.-G.-M. Pictures Ltd.* [1950] 1 All E.R. 449.

⁶⁰ *Contrast Carr v. Hood* (1808) 1 Camp. 354n., with *Du Bost v. Beresford* (1810) 2 Camp. 511, and *Dunlop Rubber Co. v. Dunlop* [1921] 1 A.C. 367.

⁶¹ This seems the correct way in which to reconcile *Peter Walker & Son Ltd. v. Hodgson* [1909] 1 K.B. 239, with *McQuire v. Western Morning News* [1903] 2 K.B. 100. See *Jones v. Skelton* [1963] 1 W.L.R. 1362, 1378.

⁶² *Sutherland v. Stopes* [1925] A.C. 47, 58, 63; *Turner v. M.-G.-M. Pictures Ltd.* [1950] 1 All E.R. 449.

Effect of malice of writer on printer

We have seen that the printer of a privileged document will not usually be protected if the writer was actuated by malice.⁶³ The same rule applies to one who prints comment on a matter of public interest. Hence the editor of a literary journal who publishes a contributed article containing criticisms of the works of a living writer which he honestly agrees with may yet be liable for the malice which, unknown to him, has actuated the author of the article.⁶⁴ In practice, however, since 1949 this will probably only occur when the plaintiff is aware of the identity of the contributor. For in that year an amendment to the Rules of Court,⁶⁵ made on the recommendation of the Porter Committee,⁶⁶ provided that where the defendant pleads fair comment or qualified privilege "no interrogatories as to the defendant's source of information or grounds of belief shall be allowed."⁶⁷

§ 73. Consent

It is a defence that the plaintiff has expressly or impliedly consented to the publication complained of—for example, in cases of slander the aggrieved party sometimes, perhaps rashly, invites the speaker "to repeat that before witnesses."⁶⁸

§ 74. Apology

The offer or the making of an apology is in general no defence to an action for libel, although it may be given in evidence in mitigation of damages.⁶⁹ But by section 2 of the Libel Act, 1843, in actions for a libel contained in a public newspaper or

⁶³ Above, § 70.

⁶⁴ See the example given by the Porter Committee, s. 130. *Cf. Lyon v. Daily Telegraph* [1943] K.B. 746.

⁶⁵ R.S.C., Ord. 82, r. 6. This made general the former practice of disallowing such interrogatories in actions against newspapers: *Georgius v. Oxford University Press* [1949] 1 K.B. 729. But note that a journalist has no general evidential privilege entitling him not to answer questions: *Att.-Gen. v. Mulholland* [1963] 2 Q.B. 477.

⁶⁶ Cmd. 7536, ss. 182–184.

⁶⁷ This also prohibits interrogatories as to the defendant's actual information and knowledge: *Adams v. Sunday Pictorial Newspapers (1920) Ltd.* [1951] 1 K.B. 354.

⁶⁸ See Boberg, "Defence of Consent in a Defamation Action" (1961) 78 S.A.L.J. 54.

⁶⁹ See below, § 75.

periodical the defendant may plead that it was inserted without actual malice and without gross negligence and that before the commencement of the action or at the earliest opportunity afterwards he inserted in the newspaper or periodical a full apology, or, if the periodical is ordinarily published at intervals exceeding one week, had offered to publish such apology in any newspaper or periodical selected by the plaintiff. Every such defence must be accompanied by a payment of money into court by way of amends.⁷⁰ Although neither the fact nor the amount of the payment into court must be disclosed to the jury,⁷¹ it seems to be the practice to disclose both in the pleadings. But in practice little use is made of this defence, for if any branch of the defence fails the plaintiff must succeed in the action, damages are assessed without regard to the payment into court, and the defendant is liable for the whole costs of the action.⁷² In any event, the provisions of section 4 of the Defamation Act, 1952, now afford wider protection in appropriate cases.

§ 75. Mitigation of Damages ⁷³

Several matters may be given in evidence in mitigation of damages.

(1) Although an apology is no defence,⁷⁴ section 1 of the Libel Act, 1848, provides that in any action for defamation the defendant may, provided he gives notice at the time of delivering his defence, give in evidence in mitigation of damages that he made or offered an apology before the commencement of the action or at the earliest opportunity afterwards if he had no opportunity before.⁷⁵ No payment into court need be made.

(2) The defendant, even though he does not plead justification, is entitled to adduce in mitigation of damages evidence of the plaintiff's general bad reputation prior to the publication of the libel. For since the plaintiff sues for an injury to his

⁷⁰ Libel Act, 1845, s. 2.

⁷¹ *Joyce v. Beaverbrook Newspapers Ltd.* [1959] Ir.Jur.Rep. 20.

⁷² See *Gatley, Libel*, Chap. 16; *Bell v. Northern Constitution* [1943] N.I. 108, and note in 6 N.I.L.Q. 18. The better procedure is to pay a sum of money into court under Ord. 82, r. 4, and plead the apology in mitigation of damages: *Chapman, Statutes*, p. 276.

⁷³ *Samuels, "Assessing Damages for Defamation"* (1963) 79 L.Q.R. 63.

⁷⁴ Above, § 74.

⁷⁵ See *Chapman, Statutes*, p. 274.

reputation, it is permissible for the defendant to prove in this way that such reputation was of little value. But the evidence is limited to general evidence as to the plaintiff's reputation in the same sector of life; it does not include specific evidence of disreputable conduct or of rumours of such conduct, otherwise the position of the plaintiff would be intolerable. In other words, the law is concerned with the plaintiff's reputation rather than with his disposition.⁷⁶ Yet the dividing line may be a fine one, for sometimes a man's reputation rests upon specific incidents of some notoriety.⁷⁷ More often, however, a man's reputation is based upon the judgment of his fellows on his general life over a period of time before the publication of the libel in suit.⁷⁸ Hence a defendant cannot give in evidence in mitigation of damages the repetition of the same defamatory words by other persons contemporaneously. A defendant cannot plead that the plaintiff's reputation has been tarnished by the fact that other people have said the same thing as he has.⁷⁹

In the absence of any plea of justification, notice must be given to the plaintiff before trial of the defendant's intention to adduce such evidence in mitigation of damages and the particulars thereof.⁸⁰ If the plaintiff in a libel action gives evidence, he is, of course, subject to cross-examination as to credit like any other witness; but if he is cross-examined as to specific incidents, not mentioned in the particulars, and denies them, no further evidence can be called to rebut his denials, and the cross-examination is not admissible to mitigate damages.⁸¹ Where the plaintiff's own evidence or answers elicited in cross-examination show him to have been guilty of malpractices which are completely unconnected with the defamatory statement, the

⁷⁶ *Plato Films Ltd. v. Speidel* [1961] A.C. 1090.

⁷⁷ See Lord Radcliffe in [1961] A.C. at 1131, and *Waters v. Sunday Pictorial Newspapers Ltd.* [1961] 1 W.L.R. 967.

⁷⁸ *Associated Newspapers Ltd. v. Dingle* [1964] A.C. 371, 399, 406.

⁷⁹ *Associated Newspapers Ltd. v. Dingle* [1964] A.C. 371.

⁸⁰ Ord. 80, r. 7.

⁸¹ *Scott v. Sampson* (1882) 8 Q.B.D. 491; *Hobbs v. Tinling* [1929] 2 K.B. 1. "In the result, a libel action may resolve itself into a tactical battle in which the defendant adopts such manoeuvres as are likely to force the plaintiff into a position where he is compelled to go into the box and give some evidence—however little—in chief, so that there may be put to him in cross-examination as to credibility the very questions which are inadmissible in cross-examination in mitigation of damages under the rule in *Scott v. Sampson*": so the Porter Committee in para. 151, and also Earl Jowitt, 178 H.L. Deb. 5s., col. 340. Parliament, however, refused to change the law.

damages will not be reduced on the ground that his reputation is not all that it might have been.⁸²

(8) It is provided by the Defamation Act, 1952,⁸³ that in any action for libel or slander the defendant may give evidence in mitigation of damages that the plaintiff has recovered damages, or has brought actions for damages for libel or slander in respect of the publication of words to the same effect as the words on which the action is founded, or has received or agreed to receive compensation in respect of any such publication. The jury should be told to consider how far the plaintiff's loss can be attributed solely to the libel with which they are concerned, and how far to the joint result of the two libels. They must be reminded that the plaintiff is not to be compensated twice for the same loss.⁸⁴ But it is irrelevant that the libel has been published elsewhere on a privileged occasion.⁸⁵

(4) Facts which tend to disprove malice may also be given in evidence.⁸⁶ Thus, the defendant may prove any facts which show that he never intended to refer to the plaintiff or did not intend the words to be understood in a defamatory sense,⁸⁷ or honestly believed that the statement was true,⁸⁸ or only published the statement by way of repetition (provided he indicated the source of his information at the time of publication⁸⁹), or was insane or drunk,⁸⁹ or provoked by the plaintiff,⁸⁹ or has the mind of a child.⁹⁰

§ 76. Slander Actionable *per se*

In the following cases slander is actionable *per se* without proof of special damage:—

- (1) An imputation that the plaintiff has committed a criminal offence;
- (2) An imputation that the plaintiff suffers from an existing contagious or infectious disease;

⁸² *Hobbs v. Tinling* [1929] 2 K.B. 1.

⁸³ s. 12. This privilege was formerly limited to newspaper defendants.

⁸⁴ *Lewis v. Daily Telegraph Ltd.* [1964] A.C. 234, 261.

⁸⁵ *Dingle v. Associated Newspapers Ltd.* [1961] 2 Q.B. 162.

⁸⁶ Provided that the terms of Ord. 80, r. 7 (above, n. 80), are complied with.

⁸⁷ *Jones v. Hulton* [1909] 2 K.B. 444, 479.

⁸⁸ *Campbell v. Spottiswoode* (1868) 3 B. & S. 769, 781.

⁸⁹ See authorities in *Gatley, Libel*, pp. 613-619.

⁹⁰ *Vaughan v. Ford*, 1953 (4) S.A. 486.

- (8) An imputation of unchastity against a woman;
- (4) An imputation against the plaintiff in the way of his business or office.

(1) Imputation of criminal offence

An imputation of a criminal offence to be actionable *per se* must amount to a direct charge, and must not be a mere suggestion or statement of suspicion.⁹¹ The crime charged need not be indictable; but it must amount to an offence punishable with imprisonment in the first instance and not be an offence punishable by fine merely, even though there is power to imprison in default of payment of the fine.⁹² It seems that the basis of this rule⁹³ is not that the words put the person defamed in jeopardy of a criminal prosecution, but that other people are likely to shun and avoid a person guilty of the conduct alleged.⁹⁴ So it is actionable *per se* to say of a man that he is "a convicted person," even though such an allegation does not put him in jeopardy of a prosecution.⁹⁵ It would seem to follow that a slander imputing to a corporation the commission of a criminal offence which in the case of a natural person would be punishable with imprisonment is actionable *per se*.⁹⁶

(2) An imputation that the plaintiff suffers from an existing contagious or infectious disease

Here again the basis of the rule is that the imputation is likely to cause other persons to shun the plaintiff. The diseases included are venereal disease,⁹⁷ leprosy or plague,⁹⁸ and probably any contagious skin complaint caused by personal uncleanness.⁹⁹

⁹¹ *Simmons v. Mitchell* (1880) 6 App.Cas. 156.

⁹² *Ormiston v. G. W. Ry.* [1917] 1 K.B. 598, 601. ("You have been travelling First Class with a Third Class ticket.")

⁹³ *Gray v. Jones* [1939] 1 All E.R. 798.

⁹⁴ Yet if this is the true criterion the necessity of proving special damage in cases of slander would be the exception and not the rule: *Gatley, Libel*, p. 53.

⁹⁵ *Gray v. Jones* [1939] 1 All E.R. 798.

⁹⁶ The point was left open by the C.A. in *D. & L. Caterers Ltd. v. D'Ajou* [1945] K.B. 364.

⁹⁷ *Houseman v. Coulson* [1948] 2 D.L.R. 62.

⁹⁸ See the old cases cited in *Gatley, Libel*, p. 57.

⁹⁹ Porter Committee's Report, para. 45.

(3) Accusation of unchastity

At common law a verbal imputation of unchastity was not actionable *per se*, but it is now provided by the Slander of Women Act, 1891, that words spoken and published which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable.¹ The plaintiff cannot recover more costs than damages unless the judge certifies that there was reasonable ground for bringing the action.

(4) Imputations in respect of profession, business, or office

Any defamatory imputation upon a man in the way of his profession, business, or office is actionable *per se*: for example, a charge of insolvency against a trader,² of incompetence against a surgeon, of ignorance against a lawyer. This is so however humble the profession or calling.³ A defamatory charge, however, against a man in respect of a business in which he is no longer engaged, or in respect of an office which he no longer holds, is not actionable *per se*.⁴ At common law a charge was not actionable *per se* merely because it tended to injure the plaintiff in the way of his business or office; it must have amounted to a charge against him in relation to his business or office. Thus, it was not actionable *per se* to impute dishonesty to a solicitor, unless he was alleged to be dishonest towards his clients.⁵ Nor was it actionable *per se* to impute immoral conduct to a schoolmaster except in the way of his business.⁶ These cases show that the common law was capable of giving rise to serious injustice.⁷ But now the Defamation Act, 1952,⁸ in accordance with the

¹ In *Youssoupoff v. Metro-Goldwyn-Mayer Pictures* (1934) *The Times*, March 6, p. 5, Avory J. said *obiter* that it was an attack upon a woman's chastity to say that she had been raped. And in the Court of Appeal Scrutton L.J. seems to have been of the same opinion, but Slesser L.J. expressed no opinion; (1934) 50 T.L.R. at 584, 587. Yet were the women who suffered from the German soldiery in Belgium in 1914 unchaste, and does a woman who receives alimony *dum casta* lose it if she is raped? But in holding that an accusation of lesbianism is an imputation of unchastity, Asquith J. considered the meaning of "*dum casta*" in this clause as irrelevant: *Kerr v. Kennedy* [1942] 1 K.B. 409.

² *Brown v. Smith* (1853) 13 C.B. 596.

³ *Gatley, Libel*, p. 67.

⁴ *Hopwood v. Thorn* (1849) 8 C.B. 293. A man may conduct several professions simultaneously: *Bull v. Vazquez* [1947] 1 All E.R. 834.

⁵ *Hopwood v. Muirson* [1945] 1 K.B. 318.

⁶ *Jones v. Jones* [1916] 2 A.C. 481.

⁷ See also the examples given by Earl Jowitt in 177 H.L. Deb. 5s., col. 1108.

⁸ s. 2.

recommendation of the Porter Committee, provides that in an action for slander in respect of words⁹ calculated to disparage the plaintiff¹⁰ in any office, profession, calling, trade or business held or carried on by him at the time of the publication,¹¹ it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business. It is probably now actionable *per se* to say of a workman that he is not a member of a trade union.¹²

§ 77. Slander: Special Damage

In all other cases of slander the plaintiff must plead and prove that he has suffered special damage as the natural and probable result of the publication of the defamatory matter. This is so, however disgraceful the imputation and however certain it may be that it will damage the reputation of the plaintiff.¹³ The special damage required in actions for slander must be the loss of some definite material advantage; it must not consist merely in the loss of reputation itself.¹⁴ Actual damage might be a more accurate term. A loss of the voluntary hospitality of friends is sufficient, however,¹⁵ and so also in all probability is a resulting separation between husband and wife.¹⁶ Further, when special damage is proved, damages can be recovered not merely for it but for the injury to the plaintiff's reputation generally—i.e., compensation is not limited to the

⁹ As defined in s. 16 (1): see above, § 53.

¹⁰ This will include a corporation (*D. & L. Caterers Ltd. v. D'Ajou* [1945] K.B. 210, 364) or unincorporate body, such as a trade union (*National Union of General & Municipal Workers v. Gillian* [1946] K.B. 81).

¹¹ These words seem wide enough to include offices of honour as well as offices of profit. Before 1952 words imputing unfitness for (as distinct from lack of integrity in) an office of honour were not actionable *per se* unless, if true, they would be a ground for removal from the office. This distinction seems no longer law: Winfield, *Tort*, p. 586; Gately, *Libel*, p. 62. *Contra*, Diplock J. in *Robinson v. Ward* (1958) *The Times*, June 17.

¹² *McMullan v. Mulhall* [1929] I.R. 470. *Contra* Gately, *Libel*, p. 66.

¹³ *Jones v. Jones* [1916] 2 A.C. 481 (immoral conduct in a schoolmaster). But an allegation of cheating at cards imputes a criminal offence: hence the plaintiff in the *Baccarat Case* did not have to show special damage: *Gordon-Cumming v. Green* (1891) 7 T.L.R. 408.

¹⁴ *Roberts v. Roberts* (1884) 5 B. & S. 384.

¹⁵ *Davies v. Solomon* (1871) L.R. 7 Q.B. 112. But not loss merely of the society of one's friends: *Palmer v. Solmes* (1880) 30 U.C.C.P. 481.

¹⁶ *Best v. Samuel Fox & Co. Ltd.* [1952] A.C. 716, 732; *Lampert v. Eastern National Omnibus Co. Ltd.* [1954] 1 W.L.R. 1047. See below, § 146.

amount of actual loss proved, although proof of some actual loss is an essential foundation for a claim for general damages.

Special damage must not be too remote. But the law of causation in defamation does not differ from that in other torts.¹⁷ It was once thought that damage immediately caused by the illegal act of a third party—*e.g.*, his dismissal of the plaintiff from his employment was too remote. But it is submitted that today the test is whether the consequence in question is the natural and reasonable result of the defendant's words,¹⁸ so that the dismissal of the plaintiff may in an appropriate case constitute special damage, whether it be wrongful or not.¹⁹ Again *Allsop v. Allsop*,²⁰ in which illness resulting from mental trouble produced by slander was held too remote, is probably no longer law in view of modern developments in the law relating to nervous shock.²¹

Yet there is a well established rule that special damage is too remote if it is due not to the original slander, but to a repetition of it by other persons.²² Therefore it is in ordinary cases insufficient for the plaintiff to prove that since the publication of the slander his business has fallen away; because such a result must have been due not to the original slander, but to the subsequent propagation of it by means of repetition.²³ But it is otherwise if the original slander is published to so many persons that the diminution of the plaintiff's business may be reasonably attributed to it rather than to subsequent repetition.²⁴

There are two exceptions to the rule that damage caused by the repetition of a slander is too remote—(1) when the original statement is made to a person who is under a legal or moral duty to repeat it²⁵; (2) when the repetition has been authorised or intended or perhaps foreseen by the defendant.²⁶

¹⁷ *Rigby v. Mirror Newspapers Ltd.* [1964] S.R.(N.S.W.) 34.

¹⁸ *Chamberlain v. Boyd* (1883) 11 Q.B.D. 407.

¹⁹ *Speake v. Hughes* [1904] 1 K.B. 138; *Longdon-Griffiths v. Smith* [1951] 1 K.B. 295.

²⁰ (1880) 5 H. & N. 534.

²¹ *Rigby v. Mirror Newspapers Ltd.* [1964] S.R.(N.S.W.) 34.

²² *Ward v. Weeks* (1890) 7 Bing. 211; *Weld-Blundell v. Stephens* [1920] A.C. 956.

²³ *Dixon v. Smith* (1880) 5 H. & N. 450.

²⁴ *Ratcliffe v. Evans* [1892] 2 Q.B. 524; *Cutler v. McPhail* [1962] 2 Q.B. 292.

²⁵ *Deny v. Handley* (1867) 16 L.T.(N.S.) 263.

²⁶ *Weld-Blundell v. Stephens* [1920] A.C. 956, 999; *Ward v. Lewis* [1955] 1 W.L.R. 9.

NEGLIGENCE

§ 78. Introductory

Intention and negligence

IN the law of torts negligence has two meanings: (1) an independent tort, with which we shall deal in the succeeding sections of this chapter; (2) a mode of committing certain torts.¹ In this latter sense negligence is carelessness. In some cases either negligence or wrongful intent is required by law as a condition of liability. Each involves a certain mental attitude of the defendant towards the consequences of his act. He intends those consequences when he foresees and desires them, has a reasonable prospect of being able to bring them about through his own volition, and therefore does the act in order that they may happen.² He is guilty of negligence, on the other hand, when he does not desire the consequences, and does not act in order to produce them, but is nevertheless indifferent or careless whether they happen or not, and therefore does not refrain from the act notwithstanding the risk that they may happen. The careless man is he who does not care—who is not anxious or not sufficiently anxious that his activities shall not be the cause of loss to others.³ The wilful wrongdoer is he who desires to do harm; the negligent wrongdoer is he who does not sufficiently desire to avoid doing it. Negligence and wrongful intent are inconsistent and mutually exclusive states of mind. He who causes a result intentionally cannot also have caused it negligently, and vice versa.⁴

The difficulty of this topic is due to some extent to the reluctance of English lawyers to generalise about their basic conceptions. There is no General Part in the common law as in the

¹ e.g., trespass or nuisance.

² *Betty's Cafés Ltd. v. Phillips Furnishing Stores Ltd.* [1959] A.C. 20, 34.

³ *Grill v. General Iron Screw Collier Co.* (1860) L.R. 1 C.P. 612.

⁴ The preceding three sentences were cited by Sholl J. in *Re Armstrong and State Rivers and Water Supply Commission* [1952] V.L.R. 187, 197. But as the judgment points out, a man may intend consequences without desiring them, and contrariwise.

civil law. Three other factors have helped the confusion. First, the action of trespass today lies only if either intention or negligence is shown. Secondly, the action of negligence lies not only for careless but also for intentional conduct: it would be no defence to such an action to plead that the conduct causing the harm amounted to a serious felony.⁵ Thirdly, there is the constant citation of the misleading maxim, "a man must be taken to intend the natural and probable consequences of his act." The maxim is misleading because it confuses the proposition to be proved with the means of proving that proposition. "In fact people often intend something quite different from what they know to be the natural and probable result of what they are doing. To take a trivial example, if I say I intend to reach the green, people will believe me although we all know that the odds are ten to one against my succeeding; and no one but a lawyer would say that I must be presumed to have intended to put my ball in the bunker because that was the natural and probable result of my shot."⁶

Inadvertence

Negligence is usually accompanied by inadvertence, but it is not the same thing, and this coincidence is not invariable.⁷ Carelessness as to possible consequences very often results in a failure to bring those consequences to mind—i.e., inadvertence. Commonly, therefore, the careless person not only does not intend the consequence but does not even advert to it; its possibility or probability does not occur to his mind. But it is not always so, for there is such a thing as wilful—i.e., conscious and advertent—negligence. The wrongdoer may not desire or intend the consequence but may yet be perfectly conscious of the risk of it. He does not intentionally cause the harm but he intentionally and consciously exposes others to the risk of it. This has been described⁸ as "an attitude of mental indifference to obvious risks."

⁵ The facts of *Hardy v. Motor Insurers' Bureau* [1964] 2 Q.B. 745 are a good example. The habit of using "negligence" to describe a deliberate act is well established, but inaccurate: *I.C.I. Ltd. v. Shatwell* [1964] 3 W.L.R. 829, 837.

⁶ *Gollins v. Gollins* [1964] A.C. 644, at 664, per Lord Reid.

⁷ *Hicks v. British Transport Commission* [1958] 1 W.L.R. 498, 503.

⁸ *Hudston v. Viney* [1921] 1 Ch. 98, at 104, per Eve J. The attitude of the defendant in *Vaughan v. Menlove* (1837) 3 Bing.N.C. 468 (see below, § 87) is a very good example of this.

§ 79. The Tort of Negligence *

Salmond did not accept the view that negligence was ever a purely objective fact involving no characteristic or essential mental attitude at all. Nor does he appear to have thought that negligence had developed into a specific tort, but regarded it merely as a state of mind providing the essential condition of liability for recognised torts. But the decision of the House of Lords in *Donoghue v. Stevenson*¹⁰ "treats negligence, where there is a duty to take care, as a specific tort in itself, and not simply as an element in some more complex relationship or in some specialised breach of duty."¹¹ Actions do not lie for a state of mind. Negligence is conduct, not a state of mind—conduct which involves an unreasonably great risk of causing damage. We have already seen that there is no necessary element of "fault" in the sense of moral blameworthiness involved in a finding that a defendant has been negligent.¹² It is negligence in the objective sense that is referred to in the well-known definition of Alderson B. in *Blyth v. Birmingham Waterworks Co.*¹³: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." So also Lord Wright said in *Lochgelly Iron and Coal Co. v. M'Mullan*¹⁴: "In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."

⁹ Winfield, "The History of Negligence in the Law of Torts" (1926) 42 L.Q.R. 184, 199. It may be asked why Intention is not a tort if Negligence is one. The answer is that some forms of intentional harm have already been given specific names—e.g., trespass, deceit, conspiracy: Dias, "The Duty Problem in Negligence" [1955] C.L.J. 198, 201.

¹⁰ [1932] A.C. 562.

¹¹ *Grant v. Australian Knitting Mills* [1936] A.C. 85, at 103, per Lord Wright.

¹² See above, § 7. Consider also the following remarks of Lord Radcliffe: "There is certainly no turpitude involved in a failure to observe that standard of care which, after full inquiry, a court of law may find to have been the appropriate measure. Those standards are not absolute: they vary with the parties and the circumstances. Nor are the rules that determine them exactly graven on tables of stone": *Workington Dock and Harbour Board v. S.S. Towerfield (Owners)* [1951] A.C. 112, at 160.

¹³ (1856) 11 Ex. 781, at 784.

¹⁴ [1934] A.C. 1, at 25.

§ 80. The Concept of Duty of Care¹⁵

(1) Duty in fact and duty in law

We proceed now to a discussion of the first of the three component parts—duty, breach, and damage—of the modern tort of negligence. It is not enough for the plaintiff to establish that the defendant has been careless: he must establish that the defendant has been careless in breach of a specific legal duty to take care. It is “a most vicious and elliptical habit,”¹⁶ but one which it is only too easy to acquire, “by transposing the word ‘careless’ into ‘neglect,’ to dismiss from one’s mind the essential problem—namely, whether or not there was in any particular case a failure of duty.”¹⁷

(2) Duty in law

It is a question of law whether in any particular circumstances a duty of care exists. “It is remarkable,” said Lord Atkin in *Donoghue v. Stevenson*,¹⁸ “how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The courts are concerned with the actual relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances.” The law, as Asquith L.J. said,¹⁹

¹⁵ See Harari, *The Place of Negligence in the Law of Torts* (Sydney, 1962); Lawson, “Duty of Care in Negligence” (1947) 22 *Tulane L.Rev.* 111; Morison, “A Re-examination of the Duty of Care” (1948) 11 *M.L.R.* 9; Payne, “The Tort of Negligence” [1953] *C.L.P.* 236; Machin, “Negligence and Interest” (1954) 17 *M.L.R.* 405; Dias, “Duty Problem in Negligence” [1955] *C.L.P.* 198; Heuston, “*Donoghue v. Stevenson* in Retrospect” (1957) 20 *M.L.R.* 1; Williams, “The Risk Principle” (1961) 77 *L.Q.R.* 179.

¹⁶ *Jones v. Vauxhall Motors* [1955] 1 *Lloyd’s Rep.* 152, at 153, *per* Stabile J.

¹⁷ *Sharp v. Avery* [1938] 4 *All E.R.* 85, at 88, *per* Slesser L.J. But see Fullagar J. in *Lorraine v. Transport Commission* (1950) 80 *C.L.R.* 357, 378.

¹⁸ [1932] *A.C.* 562, at 579.

¹⁹ *Candler v. Crane, Christmas & Co.* [1951] 2 *K.B.* 164, at 188. The passage continues: “These categories attracting the duty had been added to and subtracted from time to time. But no attempt had been made in the past to rationalise them; to find a common denominator between road users, bailees, surgeons, occupiers, and so on, which would explain why they should be bound to a duty of care and some other classes who might be expected equally to be so bound should be exempt—no attempt, that is, save that of Lord Esher M.R. (from which his colleagues dissociated themselves) in *Heaven v. Pender* (1883) 11 *Q.B.D.* 503, at 510.” Green, *Traffic Victims*, pp. 52–53, says that the statement by Lord Esher (or Sir Balgill Brett, as he was at the date of the judgment) was “a brilliant generalisation” which “comes close to generalising English tort law for the first time.”

seems to have been built up in disconnected slabs exhibiting no organic unity of structure. In 1982 an attempt was made in the House of Lords in *Donoghue v. Stevenson*¹⁸ to formulate some general criterion for the existence of the proximity which would give rise to a duty of care. The pursuer averred that she had suffered injury as a result of seeing and drinking the contaminated contents of a bottle of ginger beer manufactured by the respondent and bought from him by the owner of a café, from whom in turn it had been bought by a friend of the pursuer. The House of Lords, by a bare majority, held that if the pursuer could prove that which she averred she would have a good cause of action. We have already seen that the decision is an authority for two distinct propositions—(1) that negligence is a distinct tort²⁰; and (2) that the absence of privity of contract between plaintiff and defendant does not preclude liability in tort.²¹ It is also of course an indisputable authority for the proposition that manufacturers of products owe a duty of care to the ultimate consumer or user.²² Although it has sometimes been said that the *ratio decidendi* of the case is limited to this proposition,²³ it is now clear that the case is authority for something more. As Lord Normand said²⁴: “The argument for the defender was that there were certain relationships, such as physical proximity or contract, which alone give rise to duties in the law of quasi-delict or tort, and that the relationship between the pursuer and defender was not one of them. The decision was that the categories of negligence are not closed and that duties of care are owed, not only to physical neighbours, but to anyone who is ‘my neighbour’ in the wider sense, as stated by Lord Atkin.” *Donoghue v. Stevenson* is an authority for

²⁰ See above, § 79.

²¹ See above, § 8.

²² This aspect of the case is considered fully below, § 119.

²³ This was apparently the view of the experienced reporter who framed the “somewhat conservatively worded headnote” (as Asquith L.J. described it in [1951] 2 K.B. at 189) and seems to be supported by *Grant v. Australian Knitting Mills* [1936] A.C. 85, 102; *Howard v. Walker* [1947] K.B. 860, 863; *Marshall v. Cellactite & British Uralite Ltd.* (1947) 63 T.L.R. 456, 457; *Travers v. Gloucester Corporation* [1947] K.B. 71; *Grossman v. The King* [1952] 2 D.L.R. 241, 255-256; *McPhail v. Lanarkshire C.C.*, 1951 S.C. 801; *Hindustan S.S. Co. Ltd. v. Siemens Bros. & Co. Ltd.* [1955] 1 Lloyd’s Rep. 167, 176.

²⁴ *London Graving Dock Co. v. Horton* [1951] A.C. 737, at 757.

opening up new categories of liability²⁵ but not for disregarding existing categories.²⁶

(3) The neighbour principle

We must, therefore, refer at some length to the famous passage in which Lord Atkin formulated the proposition which has come to be generally known as "the neighbour principle."²⁷ Having referred to examples of specific situations or relations in which a duty had been held to exist, Lord Atkin continued²⁸:

"In this way it can be ascertained at any time whether the law recognises a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist. To seek a complete logical definition of the general principle is probably to go beyond the function of the judge. . . . There must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. . . . The liability for negligence, whether you style it such or treat it as in other systems as a species of *culpa*, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? ²⁸ receives a restricted reply.

²⁵ *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, 482, 524.

²⁶ See below, § 81.

²⁷ Lord Atkin's daughter wrote: "I remember his asking us whom we thought was our 'neighbour,' and he listened to us before he gave his opinion, which eventually became part of his judgment in *Donoghue v. Stevenson*. He was very interested in that case and told us he was altering the present law by his judgment": E. Cockburn Millar, "Some Memories of Lord Atkin" (1957) 23 *Glin* 18, at 15.

²⁸ The lawyer who asked this famous question received as an answer the Parable of the Good Samaritan: St. Luke, x, 25-35. It is worth noting that the Christian obligation is (see Prümmer, *Manuale Theologiae Moralis*, i,

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

This statement of principle has given rise to considerable discussion. At first a few courts displayed some uneasiness at the very wide and flexible terms in which it was propounded,²⁹ but as the years went by it became increasingly welcome and its place in the law is now assured.³⁰ It should be noted that although the neighbour principle forms part of the *ratio decidendi* of Lord Atkin's own judgment it is difficult to say that it forms part of the *ratio decidendi* of the decision itself. For although both Lord Thankerton and Lord Macmillan contemplated the addition of new duties to the law of negligence, neither of them attempted to formulate the principle or principles upon which this might be done.³¹

§ 81. Foresight as a Criterion of Liability

Although the neighbour principle is now an accepted part of English law there is still some uncertainty as to how far precisely it does extend. If Lord Atkin's statement were “read literally and without regard to the qualifying effect of its context or the

pp. 418-420) to love one's neighbour as oneself, not better than oneself. A trial judge who directed a jury that the test of “duty” was that laid down in the Book of Common Prayer has been reversed on appeal: *Di Paolo v. Kila* (1960) 23 D.L.R. (2d) 362.

²⁹ See *Farr v. Butters* [1932] 2 K.B. 606, 618-614; *Barnett v. Parker* [1940] 3 All E.R. 575, 577; and the strange outburst by Glyn-Jones J. in *Cairns v. St. Marylebone B.C.* (1954) *The Times*, December 8.

³⁰ *Davies v. Swan Motor Co.* [1949] 2 K.B. 291, 307; *Denny v. Supplies & Transport Co.* [1950] 2 K.B. 374, 377; *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164, 188.

³¹ Lord Macmillan's speech, in some respects more cautiously phrased than Lord Atkin's, is equally important. A much-cited passage (at 619) reads: “The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed.”

subjecta materies " it would comprehend " conduct of any kind, through any means (including negligent mis-statement) causing damage of any kind recognised by the law, whether physical or not, to anyone who could bring himself within " the definition of a neighbour.⁸² But to do this would be to fall into the error " of assuming that Lord Atkin was intending to formulate a *complete* criterion—almost like a definition in the prolegomena to a new theory of philosophy." ⁸³

Foresight not sole criterion

At the outset, it should be noticed that there are many torts to which the neighbour principle can, in the nature of things, have no application—for example, defamation, inducement of breach of contract, conspiracy. The interests of the individual are here protected in other ways. Nobody has seriously suggested that the whole law of tort should be reduced to a question of what the defendant ought reasonably to have foreseen in the circumstances of the particular case. The foresight of the reasonable man, or reasonable foreseeability, to use the customary but inelegant phrase, is not the necessary and sufficient condition of liability in tort—not necessary, because it has no place in torts of strict liability; not sufficient, because even within the field of what is commonly thought of as negligence, there are decisions in which the defendant escaped liability although it is clear that he must have foreseen the likelihood of harm to the plaintiff. Some of these exceptions were established in the law before 1982, and their existence reaffirmed since on the express ground that they had not been affected by *Donoghue v. Stevenson*. Obvious examples of this class are the immunity from liability of the vendor or lessor of real property,⁸⁴ the immunity from liability of an occupier towards a trespasser,⁸⁵ the absence of any duty to prevent one's domestic animals not known to be dangerous from straying onto the

⁸² *Candler v. Crane, Christmas & Co.*, at 189, per Asquith L.J. Cf. *Deyong v. Shenburn* [1946] K.B. 227, 288, per du Parc L.J. It is doubtful whether Lord Atkin intended his statement to comprehend pecuniary damage: below, § 89.

⁸³ *Haseldine v. Daw* [1941] 2 K.B. 343, at 362, per Scott L.J. See also the same learned L.J. in *Anglo-Saxon Petroleum Co., Ltd. v. Damant* [1947] 2 All E.R. 465, 467 (not reported in [1947] K.B. 794).

⁸⁴ See § 115.

⁸⁵ See below, § 112.

highway,³⁶ and the law relating to trade competition.³⁷ Others have been established since that date. Examples are the refusal of the English courts to hold that a master is under any duty to protect his servant's property from the felonious act of a third party,³⁸ or that forwarding agents are under any duty to the owners of goods to prevent fraudulent or other criminal acts by third parties³⁹; of the High Court of Australia to impose liability on the Crown for the acts of its servants engaged in active operations against its enemies⁴⁰; and of the Supreme Court of Nova Scotia to hold that the pilot of an aeroplane on a regular route was under any duty to avoid a ranch containing "noise-conscious mink."⁴¹ The courts are still free to hold that the plaintiff's interests are not in all the circumstances of the case entitled to be protected against the defendant's conduct. For reasons of policy there are limits to the actions of negligence. But it is also necessary to avoid the converse error that the catalogue of duties is closed and incapable of further expansion.⁴² The true view is that Lord Atkin's speech is a valuable practical guide which points the way to further extensions.⁴³ The existence of several undoubted exceptions to the neighbour principle does not mean that it is necessary to discard as worthless either the principle or the exceptions to it. A proper balance must be maintained. This was admirably put by a distinguished Australian judge⁴⁴: "On the one hand, we must be careful not

³⁶ See § 141.

³⁷ See § 148. A shopkeeper finds that a shop has been erected next door to him, the second shopkeeper selling the same class of goods at half the price charged by the first. The second man intends to injure the first, but still he has no cause of action, though the two are physically neighbours.

³⁸ *Edwards v. West Herts Group Hospital Management Committee* [1957] 1 W.L.R. 415 (see Goodhart, 73 L.Q.R. 313). Yet servants are under such a duty to protect their master's property: *Stansbie v. Troman* [1948] 2 K.B. 48, below, §§ 209, 210.

³⁹ *Pringle of Scotland Ltd. v. Continental Express Ltd.* [1962] 2 Lloyd's Rep. 80, 89. But see Marshall J. in *Lee Cooper Ltd. v. C. H. Jeakins & Sons Ltd.* [1964] 1 Lloyd's Rep. 300, citing the neighbour principle as his authority for creating a new tort.

⁴⁰ *Shaw, Savill & Co. v. Commonwealth* (1940) 66 C.L.R. 344.

⁴¹ *Nova-Mink Ltd. v. Trans-Canada Airlines* [1951] 2 D.L.R. 241.

⁴² In *Haseldine v. Daw* [1941] 2 K.B. 343, 362, counsel argued that our law of negligence was composed of a list of duties and that *Donoghue v. Stevenson* had only added one more to the list: "though on what principle of the common law it came to be added he did not venture to expound," was the conclusive comment of Scott L.J.

⁴³ *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, 482.

⁴⁴ Mr. Justice Fullagar, "Liability for Representations at Common Law" (1951) 25 Austr.L.J. 278.

to let it degenerate into a disguise for the application of the wholly false principle that the plaintiff (like the pre-war customer) is always right. . . . We should be careful to see that we do not, purporting to rely upon Lord Atkin, really apply a rule of strict (or, as it used to be called, absolute) liability to cases in which it would be most unjust to apply such a rule. On the other hand, it would be a great pity to crib and confine a broad principle, laid down by the highest authority, by reference to distinctions which are neither expressed nor necessarily implicit in it."

Yet it is not very easy to predict when the courts will use the neighbour principle to extend the law and when they will refuse to do so. Thus in 1963 five Law Lords sitting in the House of Lords ⁴⁵ used the neighbour principle to justify one of the most significant expansions of the law of tort in the 20th century—the inclusion within the sphere of negligence of careless statements. But in 1964 five different Law Lords sitting in the Privy Council ⁴⁶ held that the "somewhat overworked shorthand" of the neighbour principle should not be used to modify the 19th-century principle that an occupier of property owes no duty to a trespasser other than not to inflict intentional or reckless injury.

§ 82. Foresight Further Considered

(1) Duty of care and standard of care

The concept of reasonable foresight is used in seeking the answer to two distinct questions: was the defendant under any duty of care at all, and, if so, did he observe the standard required in the circumstances of the case? It is not surprising, therefore, to find some confusion in the language of the cases—one judgment describing as breach of a duty the identical conduct which another judgment describes as breach of the requisite standard of care.⁴⁷ Sometimes this can be explained by

⁴⁵ *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465 (Lords Reid, Morris of Borth-y-Gest, Hodson, Devlin and Pearce).

⁴⁶ *Commissioner for Railways v. Quinlan* [1964] A.C. 1054, 1084. (Viscount Radcliffe, Lords Evershed, Guest, Upjohn and Donovan.) As Mr. H. A. Samuels has observed (Note, 27 M.L.R. 464), none of these five Law Lords had been trained as a pure common lawyer. See also the criticism of Goodhart, "An Adult Trespasser on Railway Lines" (1964) 80 L.Q.R. 559.

⁴⁷ As Holmes long ago pointed out (*Common Law*, p. 111) "the featureless generality, that the defendant was bound to use such care as a prudent

a difference of approach. "For those who believe that negligence is not a general tort but depends on a duty arising from relations, juxtapositions, situations or conduct or activities, the duty of care thus arises. For those who take the contrary view, the standard of care is thus determined."⁴⁸ On the whole it seems preferable to reserve the term duty for the relation between parties which imposes on one a legal obligation for the benefit of the other and to deal with particular conduct in terms of a legal standard of what is required to meet the obligation.⁴⁹

(2) Duty of care and remoteness of damage

Confusion has also arisen from the fact that the concept of reasonable foresight is relevant not only in testing the existence of a duty, *i.e.*, to the question of culpability and not of compensation, but also in cases of admitted negligence (when the duty and its breach are admitted) to the question of remoteness of damage, *i.e.*, of compensation and not of culpability. This source of confusion was particularly prevalent when the test of remoteness was directness and the test of duty was reasonable foresight.⁵⁰ But it is now settled that foresight is the test both for duty and for remoteness.⁵¹ There may be difficulty in deciding whether the events which have occurred differ in kind or only in degree from those which ought reasonably to have been foreseen and guarded against,⁵² but this is a question of fact and not of law.

(3) "Proximity"

This term was used by Lord Atkin himself to describe the nature of the neighbour principle, and has since been generally adopted.⁵³ Unless the sense in which it was used is understood

man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution. Hence the temptation to say that he is under a duty to take such a precaution. The Occupiers' Liability Act, 1957 (below, § 107), imposes a "common duty of care" which is really a standard.

⁴⁸ *Insurance Commissioner v. Joyce* (1948) 77 C.L.R. 39, at 57, *per* Dixon J.

⁴⁹ Prosser, *Torts*, p. 331.

⁵⁰ See *Woods v. Duncan* [1946] A.C. 401, fully discussed in the 13th edition, pp. 413-414.

⁵¹ *The Wagon Mound* [1961] A.C. 388.

⁵² The contrast between *Hughes v. Lord Advocate* [1963] A.C. 837 and *Doughty v. Turner Manufacturing Co. Ltd.* [1964] 1 Q.B. 518 is a good example: see below, § 88.

⁵³ *Clay v. A. J. Crump & Sons Ltd.* [1964] 1 Q.B. 533, 558; *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465.

it may be misleading. On the one hand it is clear that geographical proximity between the parties is not of itself sufficient to establish liability.⁵⁴ On the other hand it is also clear that the absence of proximity in time or space will not prevent the establishment of liability: the manufacturer of poisonous tinned food is liable although his product has been shipped to the other side of the world and consumed months later.⁵⁵ The term is a convenient description of the state of affairs which exists when the relationship between the parties is such that there is a real likelihood of harm to some legally protected interest against which precaution should be taken.

(4) Two functions of reasonable foreseeability

Some confusion has also arisen from a failure to distinguish clearly between two very different functions of the concept of reasonable foreseeability. First, it may be used as a test of whether a new duty should be added to the existing list of admitted duties; secondly, it may be used as a test of the scope or extent of an admitted duty.⁵⁶ It is particularly important to make this distinction as it does not follow that because the neighbour principle is adopted in admitting a new duty into the law that the duty itself must be phrased in terms of reasonable foreseeability. The simplest illustration of this point is Lord Atkin's own judgment in *Donoghue v. Stevenson*: he created a new duty and adduced the neighbour principle as his authority for doing so; but the duty itself is, as we shall see,⁵⁷ formulated in language chosen with the greatest precision. It would be a strange reasonable man who could comprehend all its implications without instruction from a lawyer.⁵⁸

In comparatively straightforward cases of negligence, however, the scope or extent of the duty of care which the defendant admittedly owes to the plaintiff is often formulated simply in

⁵⁴ As the facts of *Bourhill v. Young* [1948] A.C. 92 clearly show.

⁵⁵ See below, § 119.

⁵⁶ See *McPhail v. Lanarkshire C.C.*, 1951 S.C. 301, 319.

⁵⁷ Below, § 119.

⁵⁸ So Denning L.J., in his well-known dissenting judgment in *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164, invoked the neighbour principle for the purpose of showing that the court should admit a new duty into the law—but he was careful to formulate the duty itself in terms which owe little or nothing to reasonable foreseeability. The House of Lords adopted a similar approach in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465; below, § 83.

terms of reasonable foreseeability. This is the duty owed, for example, by those who operate motor-vehicles on the highway.⁵⁹ Another example of a relatively straightforward case in which the notion of reasonable foreseeability was used both to create a new duty and to delimit its scope is *Powlett v. University of Alberta*,⁶⁰ in which the Board of Governors of the university were held liable to the plaintiff, who had been driven insane by the initiation ceremonies of his fellow-students.

(5) Nature of the interest infringed

It is a characteristic of the definition of the tort of negligence that it does not refer to the scope of the protection it affords to the plaintiff but rather to the qualities of blameworthiness or fault to be attributed to the conduct of the defendant. The position is precisely the reverse in torts such as defamation or conversion: the mere enunciation of the name at once indicates the nature of the interest which the plaintiff claims to have been invaded by the defendant's conduct. A failure to remember that the nature of the plaintiff's interest is a relevant factor has been responsible for some confusion, as we shall see when we consider liability for pecuniary or financial loss, and for nervous shock. Yet a moment's reflection shows how vital this factor is in a legal system which retains the concept of duty of care. For "a duty is a notional pattern of conduct,"⁶¹ and such a pattern can take shape in the mind only after a consideration of the person on whom the obligation is imposed, the mode of its performance, the person to whom it is owed, and the nature of the interest protected. Hence although it may be true enough at a fairly high level of abstraction to talk of a general duty of care based on reasonable foreseeability the discussion has meaning and significance only in relation to the particular situation or activity which is under consideration. The problem must be seen from the standpoint of the plaintiff as well as the defendant.⁶²

⁵⁹ See below, § 89.

⁶⁰ [1984] 2 W.W.R. 209.

⁶¹ Dias, [1955] C.L.J. 198, 202.

⁶² It should be noted that a negligent act may infringe two distinct interests of the one plaintiff, as in *Brunsdon v. Humphrey* (1884) 14 Q.B.D. 141 (see below, § 222).

§ 83. Pecuniary or Financial Loss

Formerly it was plain that the general rule was that the legal duty to take care to avoid causing injury to others which exists at common law is restricted to physical injury either to person or to property.⁶³ It is notable that neither Lord Esher nor Lord Atkin in their often-cited statements on this matter laid down the duty in wider terms. This does not mean that the law refuses to protect a man's financial or pecuniary interests. The existence of the whole law of contract and of such torts as intimidation, deceit, injurious falsehood, conversion and conspiracy sufficiently demonstrates the wide degree of protection afforded—and a man can always protect those interests still further by making an express contract.⁶⁴ But the reluctance to grant a remedy for the careless invasion of financial or pecuniary interests is long-standing, deep-rooted and not unreasonable.⁶⁵ For example, one who suffers pecuniary loss as the result of an inaccurate or false statement made either to himself (deceit) or to others (injurious falsehood) may have a remedy—but in each case the law requires that he should prove dishonesty and not merely carelessness. Similarly, it is a fundamental principle of the law of contract that damages are not recoverable for an innocent misrepresentation.⁶⁶ It is one thing for the law to require that he who makes a statement upon which he knows that another will act should make it honestly: it is quite another thing to require that he should guarantee its accuracy even though he has obtained no valuable benefit from the other party.

The problem may be considered under two heads—(1) careless acts, and (2) careless statements.

(1) Careless acts

There are undoubtedly many situations in which the negligence of A causing injury to B may deprive C of valuable

⁶³ *Levi v. Colgate-Palmolive* [1941] S.R.(N.S.W.) 48, 50.

⁶⁴ *Furniss v. Fitchett* [1958] N.Z.L.R. 396, 402.

⁶⁵ This sentence was cited by Barrowclough C.J. in *Furniss v. Fitchett* [1958] N.Z.L.R. 396, 401.

⁶⁶ *Heilbut, Symons & Co. v. Buckleton* [1913] A.C. 30. The Law Reform Committee, 10th Report, § 18, recommended a limited modification of this principle before the decision in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465 achieved such a modification by judicial legislation.

economic benefits. Thus B may have been made incapable of furnishing the contractual benefit which (unknown to A) he is bound to render to C,⁶⁷ or C may have insured B against the event which has happened, or C may be the wife or child or servant of B and obliged in consequence to nurse an irritable invalid or to seek new employment.⁶⁸ But the third party is not thereby invested with any right of action against the wrongdoer. The only exception to this general principle is to be found in the right of a master or husband to recover damages for the loss of the services rendered by his servant or wife. The exception is a deep-rooted historical anomaly and will not be extended.⁶⁹

(2) Careless statements ⁷⁰

In 1951 the Court of Appeal held ⁷¹ that the law distinguished between the negligent circulation of chattels and the issue of negligent misrepresentations. There was liability in the former case but not in the latter, and the distinction had not been affected by *Donoghue v. Stevenson*. But in 1968 a unanimous House of Lords in *Hedley Byrne & Co. Ltd. v. Heller and Partners Ltd.*⁷² held that in principle there was no difference between physical loss and financial loss,⁷³ and that a duty to take care in making statements existed whenever there was a special relationship and there had not been a disclaimer of responsibility. On the other hand, there has always been less

⁶⁷ *La Société Anonyme de Remorquage à Hélice v. Bennetts* [1911] 1 K.B. 249 (loss of profit on a towage contract). But see the conflicting dicta in *Morrison Steamship Co. v. Greystoke Castle (Cargo Owners)* [1947] A.C. 265, and *Seaway Hotels v. Gragg* (1959) 17 D.L.R. (2d) 292.

⁶⁸ *Best v. Samuel Fox & Co. Ltd.* [1952] A.C. 716, 731, 734. See below, § 146.

⁶⁹ *Att.-Gen. for N.S.W. v. Perpetual Trustee Co. Ltd.* [1955] A.C. 457.

⁷⁰ See Seavey, "Candler v. Crane, Christmas & Co.: Negligent Misrepresentation by Accountants" (1951) 67 L.Q.R. 466; Wilson, "Chattels and Certificates in the Law of Negligence" (1952) 15 M.L.R. 160; MacIntyre, "A Novel Assault Upon the Principle of No Liability for Innocent Misrepresentation" (1958) 81 Can. Bar Rev. 770; Stevens, "Hedley Byrne v. Heller: Judicial Creativity and Doctrinal Possibility" (1964) 27 M.L.R. 121; Gordon, "Hedley Byrne v. Heller in the House of Lords" (1964) 38 Austr.L.J. 88, 79.

⁷¹ *Candler v. Crane, Christmas & Co. (A Firm)* [1951] 2 K.B. 164.

⁷² [1964] A.C. 465.

⁷³ A point also emphasised in *Rookes v. Barnard* [1964] A.C. 1129. See below, § 150.

difficulty in holding that there is liability for careless statements causing physical loss.⁷⁴

The facts in *Hedley Byrne* were that the appellants, advertising agents, were anxious to discover the creditworthiness of Easipower Ltd., who had instructed the appellants to arrange substantial advertising contracts. Hedley Byrne asked their bank, the National Provincial, to make inquiries. National Provincial on two separate occasions made these inquiries of Hellers, a firm of merchant bankers, who were financing Easipower as well as being their bankers. The first inquiry was specifically stated by National Provincial to be "without responsibility" on the part of Hellers, and the second inquiry, asking whether Easipower was "trustworthy, in the way of business, to the extent of £100,000 per annum" was answered by Hellers stating, "without responsibility on the part of the bank or its officials," that Easipower was a "respectably constituted company, considered good for its ordinary business engagements. Your figures are larger than we are accustomed to see."⁷⁵ This reference was passed on to Hedley Byrne, who relied upon it, and suffered loss to the extent of £17,000 when, as *del credere* agents, they had to pay the sums due on the advertising contracts when Easipower went into liquidation.

The House of Lords did not decide whether Hellers had been negligent, for they held that the disclaimers were sufficient to negative any duty of care which might have existed on the assumption that there was a special relationship between the parties.⁷⁶

The decision. Some have argued⁷⁷ that the judgments are no more than *obiter dicta* in that the ultimate decision was against liability. But this is a mistaken interpretation of the distinction between *ratio decidendi* and *obiter dictum*. "To take only the qualification, which covered the actual facts, as

⁷⁴ *Clayton v. Woodman & Sons (Builders) Ltd.* [1962] 2 Q.B. 533.

⁷⁵ Bankers normally and naturally use careful terms when giving these references, but Heller's language was so guarded that only a very suspicious inquirer might have appreciated he was being warned not to give credit to the extent of £100,000.

⁷⁶ One of the many difficulties in stating the effect of the decision is that apparently Lords Morris and Hodson thought that a banker giving a general reference only owed a duty to be honest as distinct from being careful: see [1964] A.C. at 504, 513.

⁷⁷ See especially Gordon, 38 Austr.L.J. 39, 79.

being the ratio to the exclusion of the ruling as a whole, which gives it its meaning, would seem absurd.”⁷⁸ It would be pedantic and unreal to dismiss as *obiter dicta* the fully considered judgments of five Law Lords delivered after hearing eight days of argument.

Nevertheless, there are many difficult problems connected with the existence of the special relationship which will give rise to a duty of care, and the effect of a disclaimer.

Special relationships

Hedley Byrne affirms and extends the principle that a duty to be careful (as distinct from being honest) may exist in situations other than those in which there is a contract between the parties. It affirms that this duty may exist where there is a fiduciary relationship.⁷⁹ It extends that principle by stating that the duty extends to all relationships where the inquirer was trusting the other to exercise a reasonable degree of care, and when the other knew or ought to have known that the inquirer was relying on him. The House did not offer any exhaustive description or definition of these relationships.⁸⁰

In this state of uncertainty a helpful guide can be found in the famous dissenting judgment of Denning L.J. in *Candler*.⁸¹ That judgment recognises that at bottom the problem is one of exclusion: negligence in word cannot in all respects be treated like negligence in act, for that would open up too wide an arc of liability.⁸² Reasonable foresight as a criterion of liability would bring in persons whom it is generally agreed should be excluded —e.g., the solicitor giving casual advice during a railway journey,⁸³ or the marine hydrographer whose misplaced rock on a chart causes an ocean liner to go aground.⁸⁴ It is important

⁷⁸ Dias, Note [1963] C.L.J. 221. See also below, § 109, n. 92.

⁷⁹ As was held in *Nocton v. Ashburton* [1914] A.C. 932. See below, § 160.

⁸⁰ See [1964] A.C. 465, 486, 502, 514, 529, 539, for the various formulae used by the five Law Lords.

⁸¹ [1951] 2 K.B. 164. Lords Hodson, Devlin and Pearce approved it with varying degrees of emphasis: see [1964] A.C. 465, 503, 530, 539. See also the careful analysis in Gordon, 38 Austr.L.J. 79, 80–81.

⁸² See this point very well developed by R. G. Wilson, 15 M.L.R. 160, 166. The Lords conceded it: [1964] A.C. 465, 482–483, 494, 510, 534.

⁸³ Which worried Byles J. as long ago as *Fish v. Kelly* (1864) 17 C.B.(N.S.) 194.

⁸⁴ The possible misfortunes of this possible defendant have been much discussed. It has been rightly pointed out that most cartographers are

to avoid "liability in an indeterminate amount for an indeterminate time to an indeterminate class."⁸⁵ The solution is to limit liability to cases where the information or advice is given in response to an inquiry for the guidance of the very person in the very transaction in question.⁸⁶ This would render liable one who gave another a misleading reference as to the honesty of a prospective employee.⁸⁷ It might also be required that the defendant should be a person whose profession or trade it is to make statements or give information—it would hardly be desirable to impose liability on a bystander who carelessly misdirected one on his way to an important appointment.⁸⁸ It may also be helpful to distinguish between a statement and an instruction.⁸⁹ But it is important to distinguish liability for a careless statement from liability for failure to take some action which results in financial loss.⁹⁰

Barristers. It has been settled for a century that a barrister cannot be sued by his client for breach of contract.⁹¹ The fees which he receives are an honorarium. Naturally there has been doubt whether this immunity has survived the decision in *Hedley Byrne*. The General Council of the Bar thinks it has survived.⁹² But it is odd that barristers should hold themselves immune from a liability which they impose on all other professional men. Still, the immunity is justifiable either because there is a general public interest in a free and independent Bar and a barrister cannot pick and choose his clients as a solicitor can,⁹³ or because

Admiralty officials for whom the Crown would be vicariously liable: Grunfeld, "Reform in the Law of Contract" (1961) 24 M.L.R. 62, 82. But private chart producers still exist: see the definitive work by A. H. W. Robinson, *Marine Cartography in Britain* (Leicester, 1962), Chap. 7.

⁸⁵ *Ultramares Corporation v. Touche* (1931) 255 N.Y. 170, at 179; 174 N.E. 441, at 450, per Cardozo C.J.

⁸⁶ *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164, 177-178; *Herschel v. Mrupe*, 1954 (3) S.A. 464. But it is worth noting that in *Hedley Byrne* it was immaterial that Hellers did not know that National Provincial required the information specifically for the appellants—and indeed National Provincial, when transmitting the reference, did not tell the appellants the name of the respondents: [1964] A.C. 465, 482, 503.

⁸⁷ *Technovision Ltd. v. Reed*, *The Times*, April 14, 1964.

⁸⁸ [1964] A.C. 465, 495, 502, 510, 539. *Contra*, Lord Devlin in [1964] A.C. at 529.

⁸⁹ *Clayton v. Woodman & Sons (Builders) Ltd.* [1962] 2 Q.B. 533, 544.

⁹⁰ *Clark v. Kirby Smith* [1964] Ch. 506.

⁹¹ *Kennedy v. Broun* (1863) 13 C.B.(N.S.) 677.

⁹² But it has also arranged cover at Lloyd's for sets of Chambers.

⁹³ For the "cab-rank" rule, see W. W. Boulton, *Conduct and Etiquette at the Bar* (3rd ed.), p. 17.

the barrister shares in the general immunity which is given to all those taking part in the judicial process.⁹⁴ In any event, there might well be a difference between liability for careless advocacy and for an opinion given in chambers on a point of law.

The disclaimer

The true analysis of *Hedley Byrne* is that the bank was not exempting itself from a duty which already lay upon it, but rather not undertaking any duty at all, for such a duty only arose upon a voluntary assumption of responsibility. There is an analogy here with the Occupiers' Liability Act, under which there is a distinction between a notice which exempts the occupier from the common duty of care and one which discharges that duty by giving the visitor adequate warning of the danger.⁹⁵ In practice bankers have always disclaimed responsibility, and so have some other professions—e.g., the Land Registry has for many years had notices in its waiting-rooms disclaiming responsibility for advice given to inquiries. It is said that the decision is not very revolutionary if it only compels professional men to take out insurance⁹⁶ or buy a rubber-stamp on which is "without responsibility,"⁹⁷ but many professional men might think such an automatic disclaimer would have a bad effect on their reputation, and in any event the stamp might be omitted by mistake. Another difficulty is that the House of Lords has emphatically reaffirmed the rule that no third party can take a benefit under an exemption clause: there is no doctrine of vicarious immunity.⁹⁸ This would mean that the clerk might be sued when his principal could not⁹⁹—hardly a satisfactory conclusion.

Conclusion

Hedley Byrne is certainly the most striking decision in the field of negligence, perhaps in torts in general, since *Donoghue*

⁹⁴ See James, *Torts*, p. 163.

⁹⁵ See below, § 107.

⁹⁶ Yet it is believed to be difficult to insure at Lloyd's unless one belongs to one of the traditional professions.

⁹⁷ Stevens, 27 M.L.R. 121, 151.

⁹⁸ *Seruttons Ltd. v. Midland Silicones Ltd.* [1962] A.C. 446.

⁹⁹ So held in *Dodds v. Milman* (1964) 45 D.L.R. (2d) 472. Note that the second disclaimer in *Hedley Byrne* purported to exempt the officials as well as the bank.

v. Stevenson. All have recognised the judicial valour¹ shown in bringing economic loss caused by careless statements within the field of liability. Critics have pointed, 'with some justification, to the vagueness and imprecision of the language used.'² Many further decisions will be required to elucidate its significance. But it seems harsh to complain of the "Americanisation of English law," or to say that the decision gives the public "substantial benefits at the expense of the professional classes."³

§ 84. Emotional Distress

The confusion between the three related but distinct concepts of duty, standard of care, and remoteness of damage can be clearly seen in the law relating to emotional disturbance (or nervous shock).⁴ This confusion has made the scope and basis of liability somewhat uncertain and the following analysis of the case-law is therefore necessarily of a tentative character.

First, it is probable that no action lies for mere mental suffering.⁵ It was once thought that the defendant was immune even if (as would usually be the case) the mental suffering had resulted in physical lesion or disturbance.⁶ But "The crude view that the law takes cognisance only of physical injury resulting from actual impact has been discarded, and it is now well recognised that an action will lie for injury by shock sustained through the medium of the eye or the ear' without direct contact. The distinction between mental shock and bodily injury was never a scientific one, for mental shock is presumably

¹ Pollock's phrase: see (1929) 45 L.Q.R. 293.

² Stevens, 27 M.L.R. 121, 141, compares the House of Lords to Carlyle, who "led people out into the wilderness and left them there."

³ As does Gordon, 38 Austr.L.J. 79, 87-88.

⁴ See Magruder, "Mental and Emotional Disturbance in the Law of Torts" (1936) 49 Harv.L.Rev. 1033; Goodhart, "The Shock Cases and Area of Risk" (1953) 16 M.L.R. 14; *ibid.*, "Emotional Shock and the Unimaginative Taxicab Driver" (1953) 69 L.Q.R. 347; Havard, "Reasonable Foresight of Nervous Shock" (1956) 19 M.L.R. 478; Prosser, "Insult and Outrage" (1956) 44 Calif.L.Rev. 40.

⁵ This interest is not given independent protection: it is "parasitic" upon the violation of some other legally recognised interest: see below, § 204.

⁶ *Victorian Railways Commissioners v. Coultas* (1888) 13 App.Cas. 222. This case is now completely discredited: see *Chester v. Municipal Council of Waverley* (1989) 62 C.L.R. 1, 46-48.

⁷ *Boardman v. Sanderson (Keel and Block Third Party)* (1961) [1964] 1 W.L.R. 1317.

in all cases the result of, or at least accompanied by, some physical disturbance in the sufferer's system."⁸

Secondly, one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is liable for such emotional distress, provided that bodily harm results from it.⁹ In *Wilkinson v. Downton*¹⁰ the defendant, a licensed victualler, after going to the races on Derby Day, by way of a perverted practical joke, had told the plaintiff that her husband was lying injured at a public-house in Leytonstone as the result of an accident, and that she was to go at once in a cab with two pillows to fetch him home. The resultant shock to the plaintiff's nervous system produced severe and permanent physical consequences for which the defendant was held liable in damages¹¹ by R. S. Wright J.¹² The defendant is also probably liable if his conduct, though directed at some third party, causes emotional distress to another, who is known to be present and might reasonably have been foreseen as likely to be affected by it.¹³

Thirdly, an action lies for shock resulting in physical injury when the plaintiff has been placed in reasonable fear of immediate injury to himself as the result of the negligence of the defendant. The principle is that if the plaintiff has been put in peril of physical impact, it is immaterial that the impact did not materialise if physical injury is in fact caused by shock arising from the peril. "There seems to me to be no magic in actual personal contact. A threatened contact producing physical

⁸ *Bourhill v. Young* [1943] A.C. 81, at 103, per Lord Macmillan. Prosser, 44 Calif.L.Rev. 40, 43, says that emotional distress "includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, anger, embarrassment, chagrin, disappointment, worry and nausea."

⁹ This definition (slightly altered) comes from the Tentative Draft of s. 46 (1), Second Restatement of Torts, cited in Prosser, 44 Calif.L.Rev. 40, 43, where the wealth of vivid American case-law on this matter is clearly surveyed. These cases (rightly, it is submitted) confine liability to conduct of an outrageous character.

¹⁰ [1897] 2 Q.B. 57. *Janvier v. Sweeney* [1919] 2 K.B. 316 is a similar case.

¹¹ In all the plaintiff recovered £100 1s. 10½d.—£100 for emotional distress, and 1s. 10½d., the cost of a railway ticket to Leytonstone, for the distinct tort of deceit (see below, § 155). A false statement had been made with the object and effect that she should act on it to her detriment.

¹² "That most learned and accurate lawyer": *Peters v. Prince of Wales Theatre Ltd.* [1943] K.B. 78, at 77, per Goddard L.J.

¹³ See *Stevenson v. Basham* [1922] N.Z.L.R. 225 (threat to husband and resultant shock to wife). Contrast *Bunyan v. Jordan* (1937) 57 C.L.R. 1.

results should be an equivalent. The principle on which a threatened battery may justify damages for assault is in my view strictly analogous.”¹⁴ So in *Dulieu v. White & Sons*,¹⁵ the defendants were held liable when their servant negligently drove a pair-horse van into the front of a public-house, with resultant shock and illness to the plaintiff, who was standing behind the bar.

Fourthly, an action lies for shock caused by the apprehension or the actual sight or sound of immediate physical injury to a relative or friend or (possibly) any person or object.¹⁶ In *Dulieu v. White & Sons*¹⁷ Kennedy J. expressed the view that “the shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself.” But the Court of Appeal took a different view in *Hambrook v. Stokes Bros.*¹⁸ The defendants had left their lorry with its engine running at the top of a steep hill in Folkestone. It began to run away down the hill. The plaintiff’s wife, who had just left her children round a corner, received a severe nervous shock which eventually caused her death as the result of fear for her children’s safety. It was held that if these facts were proved, the plaintiff had a good cause of action under the Fatal Accidents Acts, but that it would be otherwise had the shock been caused, not by what the deceased had seen with her own eyes, but by what she had been told by bystanders of her children’s peril. In other words, although the law does not recognise a distinction between shock caused by terror and shock caused by horror,¹⁹ it does recognise a distinction between shock caused by fright and shock caused by sorrow, and does not permit

¹⁴ *Hambrook v. Stokes Bros.* [1925] 1 K.B. 141, at 162, *per* Sargant L.J.

¹⁵ [1901] 2 K.B. 669.

¹⁶ *Boardman v. Sanderson* (1961) [1964] 1 W.L.R. 1317.

¹⁷ [1901] 2 K.B. 669, 675. Followed, *Mulder v. South British Insurance Co.*, 1957 (2) S.A. 444. The American courts are still hesitant on this point: (1962) Ann. Survey of American Law 466.

¹⁸ [1925] 1 K.B. 141. The status of this decision is a little doubtful since the conflicting dicta of the H.L. in *Bourhill v. Young* [1943] A.C. 92; see Paton and Sawyer, “Ratio Decidendi and Obiter Dictum in Appellate Courts” (1947) 63 L.Q.R. 477. Some have thought it important that a breach of duty was admitted by the defendant: *King v. Phillips* [1953] 1 Q.B. 429.

¹⁹ *Bourhill v. Young*, 1941 S.L.T. 364, 366.

recovery in the latter case lest a negligent person should be held liable to an indefinite circle of relatives.²⁰

But it must be noted that Kennedy J. in *Dulieu v. White* did not say that the only sense which the law would recognise as the medium for conveying the impression of fear to the mind was the sense of sight. "I cannot imagine that Kennedy J. would ever have said anything so foolish."²¹ So the Court of Appeal²² held the defendant liable when he ran over an infant while negligently backing a car belonging to the infant's father out of a garage, knowing that the father was in earshot in another part of the garage, and the father suffered nervous shock as a result of hearing his son's screams. The distinction, which is perhaps illogical but readily grasped, depends upon whether the plaintiff had received the shock in question through his or her own unaided senses, or through the intervention of a third party. It has, however, also been held that "once a breach of duty is established, the difference between seeing and hearing is immaterial,"²³ so that a plaintiff who had herself been rendered unconscious by the defendant's negligence was able to recover also for the shock caused by hearing of her husband's death from a third party after she had recovered consciousness. No doubt this is justifiable on the ground that it was a direct and necessary consequence of the defendant's negligence that she should be informed of its consequences.²⁴

It is probable that an action also lies if the injury apprehended or actually seen or heard is to any other relative²⁵ or friend,²⁶ or even any bystander,²⁷ but the court ruled against liability when the plaintiff suffered shock from seeing her pet cat killed in front of her eyes.²⁸ Protection may even be extended to one who has witnessed some unnerving or ghastly

²⁰ *Guay v. Sun Publishing Co. Ltd.* [1953] 4 D.L.R. 577 (no liability for shock resulting from reading false report of husband's death).

²¹ *Bourhill v. Young*, 1941 S.L.T. 364, at 385, per Lord Justice-Clerk Aitchison.

²² *Boardman v. Sanderson* (1961) [1964] 1 W.L.R. 1817.

²³ *Schneider v. Eisovitch* [1960] 2 Q.B. 480, at 441, per Paull J. *Contra*, *Wood v. Miller*, 1958 S.L.T.(Notes) 49.

²⁴ *Brown v. Mount Baker Hospital* [1984] S.A.S.R. 128.

²⁵ *Currie v. Wardrop*, 1927 S.C. 538 (fiancé); *Turbayfield v. G. W. R.* (1988) 54 T.L.R. 221 (sister).

²⁶ [1948] A.C. at 117; *Dooley v. Cammell Laird Ltd.* [1951] 1 Lloyd's Rep. 271.

²⁷ *Hambrook v. Stokes Bros.* [1925] 1 K.B. 141, 157.

²⁸ *Davies v. Bennison* (1927) 22 Tas.Law Rep. 52.

spectacle, though neither the life nor limb of any third party has been imperilled.²⁹

The result of the cases is that it is unnecessary for the plaintiff to show that he was himself in danger of physical impact. Foreseeability of injury from shock is what the law requires.³⁰ It is true that in *Bourhill v. Young*³¹ the House of Lords denied recovery to a plaintiff outside the area of physical impact who had suffered shock as a result of hearing a highway accident. The plaintiff was a fishwife who had heard the accident (which was caused by the admitted negligence of the deceased motor-cyclist) while she was getting her basket off the far side of a stationary tramcar some 50 feet away from the accident.³² The House of Lords held that the motor-cyclist owed no duty to the plaintiff: he could not reasonably have anticipated that anyone in her position would be affected by his negligence. But this decision is no more than an application of the principle of reasonable foresight to the facts of the particular case.³³ The position of the plaintiff is a relevant (but not decisive) factor in determining whether the defendant ought reasonably to have foreseen the risk of emotional distress.³⁴

The final result is not unsatisfactory: yet the mass of confusing dicta which the cases contain is in truth due to a failure to appreciate the fundamental fact that the question cannot be answered solely by logic and that an issue of policy is involved for which the concept of reasonable foreseeability is by itself incapable of providing a solution. For whether a person outside the area of physical impact has a legally protected right to be free from the emotional distress occasioned by the sight of the peril in which others have been placed by the defendant's negligence is really a question which each legal system must

²⁹ *Owens v. Liverpool Corporation* [1939] 2 K.B. 394 (hearse containing relative's coffin overturned). But this decision was doubted by Lords Thankerton, Wright and Porter in *Bourhill v. Young*.

³⁰ *The Wagon Mound* [1961] A.C. 388, 426.

³¹ [1943] A.C. 92.

³² It is not too clear whether the plaintiff also saw the results of the collision. The truth seems to be that, after the custom of her kind, she returned to look at the blood on the road after she had delivered some of her fish: 1941 S.L.T. at 373.

³³ *Boardman v. Sanderson* [1964] 1 W.L.R. 1317, (1961).

³⁴ *Dooley v. Cammell Laird Ltd.* [1951] 1 Lloyd's Rep. 271; *King v. Phillips* [1953] 1 Q.B. 429; Goodhart, 69 L.Q.R. 374.

decide for itself after due consideration of the various social interests involved.³⁵

§ 85. Scope of the Duty

(1) Unforeseeable plaintiffs

There is no liability for negligence unless there is in the particular case a legal duty to take care, and this duty must be one which is owed to the plaintiff himself and not merely to others.³⁶ This duty of carefulness is not universal; it does not extend to all occasions, and all persons, and all modes of activity. So Lord Esher M.R. once uttered the characteristic remark that: "If a man is driving on Salisbury Plain, and no other person is near him, he is at liberty to drive as fast and as recklessly as he pleases."³⁷ So a man may be under a duty of care towards one person, and yet in the same matter and on the same occasion under no duty of care towards another.³⁸ Two well-known cases illustrate the point. In *Palsgraf v. Long Island Railroad Co.*³⁹ two servants of the defendants, while helping a passenger to board a train, negligently dislodged a parcel carried by the passenger: the parcel fell and its contents (assumed to be fireworks) exploded. The shock of the explosion knocked over some scales about 25 feet away, which in turn struck and injured the plaintiff. A majority of the New York Court of Appeals held that she could not recover. Cardozo C.J. said: "The conduct of the defendants' guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff standing far away. Relative to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus

³⁵ See this well brought out in *Waube v. Warrington* (1935) 216 Wis. 603; 258 N.W. 497.

³⁶ This sentence was cited in *Palsgraf v. Long Island Railroad Co.* (1928) 284 N.Y. 339, 162 N.E. 99—with approval by Cardozo C.J., and with disapproval by Andrews J. (dissenting).

³⁷ *Le Lièvre v. Gould* [1893] 1 Q.B. 491, at 497. Lord Esher was not considering criminal liability.

³⁸ But it is not necessary that there should be a specific person to whom the duty is owed at the time of the negligence: the duty may be potential or contingent: *Grant v. Australian Knitting Mills* [1936] A.C. 85, 104; *Watson v. Fran Reinforced Concrete Co. Ltd., and Winget Ltd.*, 1960 S.C. 100, 116.

³⁹ (1928) 284 N.Y. 339; 162 N.E. 99.

removed. . . . The law of causation, remote or proximate, is thus foreign to the case before us." The English equivalent of the *Palsgraf* case is *Bourhill v. Young*,⁴⁰ the facts of which have already been given,⁴¹ in which the House of Lords held that the question was one of liability and not of remoteness and that in the circumstances the respondent owed no duty to the appellant: he could not reasonably have anticipated that anyone in her position would have been affected by his negligent act. In the light of these cases it would seem that in some of the older cases⁴² facts which have in reality raised a problem as to the existence of a duty have been treated on the basis that the question involved was the remoteness of the damage.⁴³

(2) Scope of the risk or hazard

The harm to the plaintiff's interest which has in fact occurred must be of a kind against which it was the duty of the defendant to take precautions. So, although a peculiar duty to take care is imposed on those who send firearms out into the world, nobody would contend that an action would lie if A lent a loaded gun to B, who dropped it onto C's toes.⁴⁴

(3) Affirmative obligations⁴⁵

In the absence of some existing duty the general principle is that there is no liability for a mere omission to act.⁴⁶ The fundamental notion appears to be that the imposition of an obligation to take positive steps for the benefit of another requires that that other should furnish something by way of consideration.⁴⁷ So there is no legal obligation to warn one

⁴⁰ [1943] A.C. 92.

⁴¹ See above, § 84.

⁴² e.g., *Smith v. L. & S.W. Ry.* (1870) L.R. 6 C.P. 14, 21.

⁴³ This sentence was referred to by Hallett J. in *Merrington v. Ironbridge Metal Works Ltd.* [1952] 2 All E.R. 1101, 1105.

⁴⁴ The well-known case of *Gorris v. Scott* (1874) L.R. 9 Ex. 125 (see below, § 99) is perhaps the best example of this point. See also *Jones v. Llozz Quarries Ltd.* [1952] 2 Q.B. 608 (below, § 96).

⁴⁵ Bohlen, *Studies*, Chaps. 2 and 6; Wright, "Negligent Acts or Omissions" (1941) 19 Can.Bar Rev. 465; Lücke, "Towards a General Theory of Negligence" (1960) 2 M.U.L.R. 472.

⁴⁶ The principle is the same in the civil law: Lawson, *Negligence in the Civil Law*, pp. 31-36.

⁴⁷ As in the former immunity of highway authorities for non-feasance: above, § 32. See also the contrast between the duties of inviters and licensors, below, §§ 104, 109.

who is about to walk into a trap or to rescue him from his perilous situation when he has done so. Thus one servant owes to another no duty to warn that other against a danger which no action of his has caused or contributed to: a mere non-feasance, without more, even though it may be a breach of duty to the master, is not a wrong to the fellow-servant.⁴⁸ But there may be liability if the defendant is in the position of a master or invitor, or the risk has resulted from the use of some instrumentality under his control,⁴⁹ or land occupied by him,⁵⁰ or he has voluntarily intervened to render help. "The result of all this is that the good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing."⁵¹ So a doctor who gives first aid to the victim of a traffic accident, although he has a statutory right to recover the cost of his treatment,⁵² may find himself sued for negligence by the victim.⁵³ It is clear that one who has already entered into some relationship with another may be liable to that other for omissions as well as for acts.⁵⁴ So the motorist who fails to blow his horn, with the result that another user of the highway is injured, or the employer who fails to provide the safety device appropriate to the dangerous task upon which his men are working, may each be held responsible. Again an employer who fails to call in medical aid for an employee who has been injured in the course of his work may in certain circumstances be liable.⁵⁵ But it should be remembered that the burden of proof lies heavy on a plaintiff who alleges that the negligence complained of consists in an act of omission.⁵⁶

⁴⁸ *Quinn v. Hill* [1957] V.L.R. 439.

⁴⁹ See *Ayres (L. S.) & Co. v. Hicks* (1942) 40 N.E. (2d) 334. Cf. *Vanvakenburg v. Northern Navigation Co.* [1918] 19 D.L.R. 649.

⁵⁰ *Hargrave v. Goldman* [1964] A.L.R. 377.

⁵¹ Prosser, *Torts*, p. 339. See *Depue v. Flateau* (1907) 100 Minn. 299; 111 N.W. 1 (sick guest sent out into freezing night); *Silva's Fishing Corp'n. v. Mawesa*, 1957 (2) S.A. 256.

⁵² Road Traffic Act, 1960, ss. 213-214.

⁵³ Nearly half of some American doctors polled said they would not render aid in an emergency: Prosser, *Torts*, p. 340. See also above, § 12.

⁵⁴ *Kelly v. Metropolitan Ry.* [1895] 1 Q.B. 944.

⁵⁵ *Kasapis v. Laimos Bros. Ltd.* [1959] 2 Lloyd's Rep. 378, 381.

⁵⁶ See below, § 90. Many of the cases of omission may be regarded as cases of commission: "A medical man who diagnoses a case of measles as a case of scarlet fever may be said to have omitted to make a correct diagnosis; he may equally be said to have made an incorrect diagnosis":

(4) Position of volunteers

It has already been noticed that in general one who has full knowledge of the nature and extent of the risk and is entirely free to avoid it, but nevertheless voluntarily goes on and is injured, cannot recover.⁵⁷ This may either be because the defences of *volenti non fit injuria* or contributory negligence have been raised successfully or because the defendant's duty in the particular relationship under consideration is held to have been discharged. The latter view has been adopted in cases dealing with the liability of drunken drivers of vehicles to their passengers.⁵⁸ This is said to be "a more satisfactory manner of ascertaining their respective rights than by opposing to a fixed measure of duty exculpatory considerations, such as the voluntary assumption of risk or contributory negligence."⁵⁹

(5) Position of abnormal plaintiffs

Once a breach of duty has been established, the defendant must take his victim as he finds him.⁶⁰ In determining whether a duty exists, however, the law will not take account of abnormal susceptibilities or infirmities in the person⁶¹ or property⁶² of the plaintiff of which the defendant neither knew nor could reasonably be taken to have foreseen. But if the defendant knows that the plaintiff has some characteristic or incapacity which will increase the risk of harm, the court may hold that the defendant owes a proportionately higher degree of care. So the House of Lords has held⁶³ that persons carrying out excavations in a London street ought to foresee the presence of blind persons (of whom there are some 7,000 in London) and protect them by some better device than a punner hammer⁶⁴ with a handle

Harnett v. Bond [1924] 2 K.B. 517, at 541, *per* Bankes L.J. See also Denning L.J. in *Hawkins v. Coulsdon & Purley U. D. C.* [1954] 1 Q.B. 319.

⁵⁷ Above, §§ 12-14.

⁵⁸ *Insurance Commissioner v. Joyce* (1948) 77 C.L.R. 39.

⁵⁹ *Ibid.*, at 59, *per* Dixon J.

⁶⁰ See below, § 208.

⁶¹ *McLaughlin v. Trimmer* (1946) 79 Ll.L.R. 649 (decayed tooth).

⁶² *Nova-Mink Ltd. v. Trans-Canada Airlines* [1951] 2 D.L.R. 241 (extra-sensitive mink).

⁶³ *Haley v. London Electricity Board* [1964] 3 W.L.R. 479.

⁶⁴ A hammer for beating down earth.

sloping at a height of two feet. This does not place an undue burden on defendants, for they are entitled to assume that there are places to which the blind will not go unaccompanied, and that they will take reasonable care for their own safety—*e.g.*, by using a white stick.⁶⁵

§ 86. Value of the Concept of Duty of Care

The concept is peculiar to the common law of England, and for that reason alone it has sometimes been criticised. It is true that Roman law dispensed with any special duty between the parties and imposed liability whenever there was damage unjustifiably done. It has been said that the Roman doctrine, restricted as it was by rules similar to those of contributory negligence and remoteness, provided a simpler and perhaps better solution of the problems involved than English law with its reliance upon a duty to take care.⁶⁶ Indeed, Winfield thought ⁶⁷ that every case could be just as well decided on some ground not depending on duty at all—sufficiency of evidence for the jury, contributory negligence, remoteness of damage, inevitable accident, *volenti non fit injuria*. But Professor Lawson has pointed out ⁶⁸ that there are and must be limits to the action of negligence which have nothing to do with these factors. No doubt they “are relevant once one is in the field of negligence, but they do not explain why a person who fails in a prosecution cannot be made liable in tort without proof of malice. That is a matter of pure policy, and the technical way in which English law expresses it is by saying that a person is under no duty of care when instituting a prosecution.”

⁶⁵ *Haley v. London Electricity Board* [1964] 3 W.L.R. 479, 487. A similar principle obtains in assessing the standard of care owed to children: see below, § 96.

⁶⁶ Buckland, “The Duty to Take Care” (1935) 51 L.Q.R. 637; *Reflections on Jurisprudence*, pp. 110–115; for Roman-Dutch theory, see Price, “Aquilian Liability and the ‘Duty of Care’: A Return to the Charge” (1959) *Acta Juridica* 120.

⁶⁷ “Duty in Tortious Negligence” (1934) 34 Col.L.Rev. 41, 44–54.

⁶⁸ “The Duty of Care in Negligence: a Comparative Survey” (1947) 22 *Tulane L.R.* 111, 113. His conclusion is: “The concept of a duty of care, to be established as a matter of law to the satisfaction of the court, provides an admirable instance of cautious advance congenial to the English temperament, and wholly appropriate to the genius of the common law.”

Duty has useful function

Another criticism which has sometimes been made of the concept of duty of care is that it is a formula which is expressed in terms of results rather than reasons—"a shorthand analysis of a conclusion, rather than an aid to analysis in itself."⁶⁹ "When upon analysis of the circumstances and application of the appropriate formula a court holds that the defendant was under a duty of care, the court is stating as a conclusion of law what is really a conclusion of policy as to responsibility for conduct involving unreasonable risk. It is saying that such circumstances presented such an appreciable risk of harm to others as to entitle them to protection against unreasonable conduct by the actor. It is declaring also that a cause of action can exist in other situations of the same type, and *pro tanto* is moving in the direction of establishing further categories of human relationships entailing recognised duties of care. . . . Accordingly there is always a large element of judicial policy and social expediency involved in the determination of the duty problem, however it may be obscured by use of the traditional formulae."⁷⁰ It cannot be denied that there is much truth in this. Yet the nature of negligence is such that there will always be much room for the exercise of a creative choice by a court confronted with a difficult problem, and the concept of a duty (unlike the concepts of standard of care and remoteness) does at least bring this problem to the fore.⁷¹ "The real effect of the foregoing is that categories become the servants and not the masters of the law of negligence. It may be a common tendency to attempt classification of the various human relationships which may give rise to a breach of duty. But the more modern decisions to which I have referred indicate that such classifications cannot be final. They cannot be set up as inflexible yardsticks, but must be regarded rather as convenient sensitive

⁶⁹ Prosser, *Torts*, p. 332. The learned author remarks, however, that the concept is too deeply embedded in our law to be discarded and that no satisfactory substitute for it has yet been devised.

⁷⁰ *Nova-Mink Ltd. v. Trans-Canada Airlines* [1951] 2 D.L.R. 241, at 255, *per* Macdonald J.

⁷¹ Fleming, 31 Can.Bar Rev. at 493. See also Dixon C.J. and Williams J. in *Thompson v. Bankstown Corporation* (1953) 87 C.L.R. 619, at 623: "The difficulty in deciding this appeal arises from the possibility and perhaps the necessity of choosing between two competing categories of the law of torts and applying one of them to the facts to the exclusion of the other."

instruments fashioned and refashioned from time to time in the judicial workshops, to record and harmonise the relation between the law and altering social and business outlooks.”⁷²

§ 87. The Reasonable Man

Standard is objective

The standard of conduct required by the common law is that of the reasonable man. This has been settled ever since the decision of the Court of Common Pleas in *Vaughan v. Menlove*.⁷³ The plaintiff had an interest in certain cottages on land adjoining that on which the defendant had erected a haystack. The plaintiff's cottages were damaged by a fire which had spontaneously ignited in the haystack, which was insured. “When the condition of the stack, and the probable and almost inevitable consequence of permitting it to remain in its then state were pointed out to him, he abstained from the exercise of the precautionary measures that common prudence and foresight would naturally suggest, and very coolly observed that ‘he would chance it’; it was manifest that he adverted to his interest in the insurance office.”⁷⁴ The argument for the defendant that it was enough if he had acted bona fide to the best of his judgment was rejected, Sir Nicolas Tindal C.J. saying: “Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.”⁷⁵ “The standard of foresight of the reasonable man,” said Lord Macmillan,⁷⁶ “eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust

⁷² *Crewe v. Star Publishing Co. Ltd.* (1942) 58 B.C.C.R. 103, at 127, per O'Halloran J.A.

⁷³ (1837) 3 Bing.N.C. 468; 4 Scott 244.

⁷⁴ 4 Scott, at 254, per Vaughan J. This must be the earliest, and one of the most interesting, judicial references to the impact of insurance on torts: see above, § 8.

⁷⁵ 3 Bing.N.C., at 475. Cf. Alderson B. in *Blyth v. Birmingham Waterworks Co.* (1856) 11 Ex. 781, 784, cited above, § 79.

⁷⁶ *Glasgow Corporation v. Muir* [1943] A.C. 448, at 457.

temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence." "A reasonable man does not mean a paragon of circumspection." "But he is also cool and collected and remembers to take precautions for his own safety even in an emergency."⁷⁸ So, while on the one hand an error of judgment may not amount to negligence,⁷⁹ on the other hand the fact that "it might happen to anyone" is not necessarily a defence⁸⁰—even the most careful are sometimes careless. And Greer L.J. said: "The person concerned is sometimes described as 'the man in the street,' or 'the man on the Clapham omnibus,' or, as I recently read in an American author, 'the man who takes the magazines at home and in the evening pushes the lawn mower in his shirt sleeves.'"⁸¹

But a certain subjective element

On the whole, expert knowledge is not to be attributed to the ordinary man.⁸² Some difficulty was caused by the *Wagon Mound*,⁸³ in which the Judicial Committee held that it was not reasonably foreseeable by the ordinary man that furnace oil spilt on sea-water could be ignited. An expert who knew that such oil had a flash-point of 170°F. (established by "the Pensky-Martin's closed-cup determination") would not foresee fire: but would the reasonable man have such knowledge? It has now been made clear⁸⁴ that the test is: what would be foreseen by a reasonable observer of the class whose conduct is in question—i.e., in this case, officers of the merchant navy.

⁷⁷ *Billings & Sons v. Riden* [1958] A.C. 240, at 255, per Lord Reid.

⁷⁸ *Ghannan v. Glasgow Corporation*, 1950 S.C. 23.

⁷⁹ *Latimer v. A. E. C. Ltd.* [1953] A.C. 643, 656.

⁸⁰ *Lewis v. Carmarthenshire County Council* [1953] 1 All E.R. 1025, 1028.

⁸¹ *Hall v. Brooklands Auto-Racing Club* [1938] 1 K.B. 205, at 224. Yet "God forbid that the standard of manners should be taken from the man on the Clapham omnibus": *Lea v. Justice of the Peace, Ltd.* (reported *sub nom. Privacy and the Press*, London, 1947), at 156, per Hilbery J.

⁸² *Roe v. Minister of Health* [1954] 2 Q.B. 66. See below, p. 307.

⁸³ [1961] A.C. 388. See the full discussion below, § 208.

⁸⁴ *The Wagon Mound (No. 2)* [1968] 1 Lloyd's Rep. 402. (An action by different plaintiffs on the same facts).

Different degrees of negligence not recognised

The law of torts⁸⁵ does not recognise different standards of care or different degrees of negligence in different classes of cases. The sole standard is the care that would be shown in the circumstances by a reasonably careful man, and the sole form of negligence is a failure to use this amount of care. It is true, indeed, that this amount will be different in different cases, for a reasonable man will not show the same anxious care when handling an umbrella as when handling a loaded gun.⁸⁶ Thus on occasion there may be a duty to take special care, but this does not mean that a special category is created in which alone a duty exists.⁸⁷ Again a man may hold himself out as having a special skill which he does not in fact possess and then the maxim *imperitia culpa adnumeratur* applies. It is commonly a negligent act voluntarily to undertake the doing of any act which can be safely done only through the possession of special skill, unless the doer possesses, or believes on reasonable grounds that he possesses, the requisite skill. It is care, not skill, which is owed to the plaintiff. The negligence does not consist in the lack of skill but in undertaking the work without skill. Thus a surgeon, though he is not an insurer against every accidental slip, must exercise such care as a normally skilful member of the profession may reasonably be expected to exercise,⁸⁸ but a jeweller who pierces ears for earrings is only under a duty to take the precautions which may reasonably be expected of a jeweller.⁸⁹ So a very high standard of skill and care is demanded of the driver of a motor-car—since the motor-car has become a lethal weapon. Like the surgeon, he undertakes to perform an extremely difficult task, involving extremely dangerous consequences for other persons.⁹⁰ So in some circumstances the reasonable driver will take all possible care.⁹¹ But this is a

⁸⁵ *Pentecost v. London District Auditor* [1951] 2 K.B. 759, 764. *Aliter* in other branches of law, e.g., trusts and criminal law.

⁸⁶ *Beckett v. Newalls Insulation Co. Ltd.* [1953] 1 W.L.R. 8, 17.

⁸⁷ *Bressington v. Railways Commissioner* (1947) 47 S.R.(N.S.W.) 472, 475. This temptation has not always been resisted, as the law relating to things dangerous *per se* (below, § 118) demonstrates.

⁸⁸ *Whiteford v. Hunter* [1950] W.N. 533. See below, § 89.

⁸⁹ *Phillips v. Whiteley Ltd.* [1938] 1 All E.R. 566.

⁹⁰ *Daly v. Liverpool Corporation* [1939] 2 All E.R. 142, 144.

⁹¹ *Randall v. Tarrant* [1955] 1 W.L.R. 255, 259.

different thing from recognising different legal standards of care; the test of negligence is the same in all cases.⁹²

Defendant's incapacity irrelevant

The same principle applies to the lack of any other qualification for the safe conduct of an operation, such as knowledge, sound judgment, sound health, physical strength, or the possession of any other requisite mental or bodily faculty. No man is to blame because fate has denied him good sense, or a retentive memory, or a quick apprehension, or sound eyesight; these defects are in themselves mere misfortunes for which he is no more accountable in law than in justice; but if, lacking those qualities, and having reasonable means of knowing that he lacks them, he enters on activities which demand the possession of them, he may be guilty of negligence. The law "does not attempt to see men as God sees them, for more than one sufficient reason. . . . If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbours, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbours than if they sprang from guilty neglect."⁹³ The foolish and the forgetful are judged by the same external standard as other defendants. So if an occupier of property is aware of the existence on his premises of physical facts which would constitute a trap to a licensee, he will not be permitted to say that he did not appreciate that those facts constituted a trap.⁹⁴ An apparent

⁹² Nevertheless, in *Coggs v. Bernard* (1704) 2 Ld.Raym. 909, an unfortunate attempt was made to introduce into English law the misunderstandings of the Roman law of negligence that were then received among the civilians. According to this doctrine there are three different kinds or degrees of negligence—ordinary, gross, and slight. There are no authorities which compel us to admit that distinctions so vague and impracticable in their nature, so unfounded in principle, and so clearly rooted in historical error as to the rules of Roman law, form any genuine part of the law of England. In *Wilson v. Brett* (1843) 11 M. & W. 113, at 115, Rolfe B. observed that he "could see no difference between negligence and gross negligence, that it was the same thing with the addition of a vituperative epithet," and this observation was approved by Willes J. in *Grill v. Iron Screw Collier Co.* (1866) L.R. 1 C.P. 600, 612. But the liability of occupiers to trespassers is measured by intention or recklessness: see below, § 112.

⁹³ Holmes, *The Common Law*, p. 108. See also *McGrath v. National Coal Board* (unreported), H.L., May 4, 1954, *per* Lord Reid.

⁹⁴ *Hawkins v. Coulsdon & Purley U.D.C.* [1954] 1 Q.B. 319.

exception to this principle may be found in the case of a minor: it seems to be accepted that the standard of care required is only that which would reasonably be expected of a child of the defendant's age.⁹⁵

If, however, a person thus deficient in some attribute of the ordinary and average man is placed without his own choice in some situation where the possession of that attribute is requisite for the avoidance of harm, he is not responsible for negligence merely because the ordinary man could have avoided the accident. He must be judged with reference to his own capacities of mind and body, and if he does his best, he does enough, even though a man better endowed would have been bound to do much more. A blind man must not voluntarily do an act which can be safely done only by those who have eyes to see, but if he has such action thrust upon him through no choice of his, he will not be judged as though he could see.

§ 88. The Concept of Risk

There is now a marked tendency to expound the standard of care required in any particular case more in terms of risk than in terms of reasonable foreseeability. A risk is a chance of harm to others which the party whose conduct has been called in question should have recognised. Hence negligence is conduct which falls below the standard established by the law for the protection of others against unreasonable risk of harm. (The risk or hazard in question must, as we have already seen, be to a legally protected interest of the plaintiff.⁹⁶) "It is fundamental," says a distinguished American authority,⁹⁷ "that the standard of conduct which is the basis of the law of negligence is determined by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued." The required standard of conduct is thus a question of fact in each particular case but the question is answered after taking these factors into account. There are really three chief matters

⁹⁵ Below, § 196.

⁹⁶ See above, § 85.

⁹⁷ Prosser, *Torts*, p. 152.

for consideration: (1) the magnitude of the risk to which the defendant exposes other persons by his action; (2) the importance of the object to be attained by the dangerous form of activity; (3) the burden of adequate precautions.⁹⁸ We shall consider each separately.

(1) The magnitude of the risk to which others are exposed

The law in all cases exacts a degree of care commensurate with the risk created.⁹⁹ There are two factors in determining the magnitude of a risk—the seriousness of the injury risked, and the likelihood of the injury being in fact caused.¹

(i) Gravity of the injury

In *Paris v. Stepney Borough Council*² the plaintiff, who had only one good eye, was blinded in the course of his employment. He contended successfully that his employers, by omitting to provide him with goggles, were in breach of their duty to take reasonable care of his safety because, though it was not the practice to provide goggles for that class of work, they must have known that the consequences of an accident to his good eye would be peculiarly disastrous. In the Court of Appeal Asquith L.J.³ had said⁴ that “A greater risk of injury is not

⁹⁸ *Hicks v. British Transport Commission* [1958] 1 W.L.R. 493, 505. This approach has been adopted in many other English cases: see *McCarthy v. Coldair, Ltd.* [1951] 2 T.L.R. 1226; *Watt v. Hertfordshire C.C.* [1954] 1 W.L.R. 835; *Jones v. Vauxhall Motors* [1955] 1 Lloyd's Rep. 152; *Morris v. West Hartlepool S.N. Co.* [1956] A.C. 552; *Videan v. B.T.C.* [1963] 2 Q.B. 650.

⁹⁹ *Read v. J. Lyons & Co.* [1947] A.C. 156, 173; *Lloyd's Bank v. Railway Executive* [1952] 1 All E.R. 1248, 1253. For a similar approach in the criminal law, see *The People v. Dunleavy* [1948] I.R. 95 (manslaughter).

¹ This sentence was cited with approval by Lord Normand in *Paris v. Stepney B.C.* [1951] A.C. 367, 381. A vivid summary has been given by Judge Learned Hand: “The duty . . . is a function of three variables: (1) the probability that she [defendant's ship] will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of the adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury L; and the burden B; liability depends upon whether B is less than L multiplied by P; i.e., whether $B < PL$ ”: *United States v. Carroll Towing Co.* (1947) 159 F. (2d) 169, at 173.

² [1951] A.C. 367.

³ “Than whom there have been few greater masters of the English language in judicial interpretation or exposition”: *Betty's Cafés, Ltd. v. Phillips Furnishing Stores Ltd.* [1959] A.C. 20, at 84, per Viscount Simonds.

⁴ [1950] 1 K.B. 820, at 824.

the same thing as a risk of greater injury; the first alone is relevant to liability." This neatly phrased apophthegm was disapproved in the House of Lords. It was pointed out that the duty of an employer to take reasonable care to protect his servant is owed to each individual workman and a reasonable and prudent employer would be influenced not only by the greater or less probability of an accident occurring to the workman in question but also by the gravity of the consequences to him if an accident did occur.⁵ Protection in the way of goggles should be provided for two-eyed men as well as for one-eyed men if the risk is sufficiently great.⁶

But if an employee has some special susceptibility to harm it does not follow that his employers are guilty of negligence merely because they know of this and yet permit him to continue with the only work which they can offer him.⁷

(ii) *Likelihood of injury*

The general principle is that before negligence can be established it must be shown not only that the event was foreseeable but also that there is a reasonable likelihood of injury. To base liability upon foreseeability alone would be too severe, for "foreseeability does not include any idea of likelihood at all."⁸

Probability of danger

So, on the one hand, it is clear that "if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions. . . . People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities."⁹ Thus in *Blyth*

⁵ The factor of the plaintiff's unusual susceptibility is also considered above, § 85. The difficulty of these cases is shown by the fact that although all the members of the House agreed on the law, two (Lord Simonds and Lord Morton of Henryton) dissented on its application to the facts. The annual report of the Chief Inspector of Factories (1950) Cmd. 8445, stated that about 200,000 eye accidents occur each year in factories but that, even when goggles are provided, it is very difficult to induce workers to wear them.

⁶ *Nolan v. Dental Manufacturing Co. Ltd.* [1958] 1 W.L.R. 936.

⁷ *Withers v. Perry Chain Co. Ltd.* [1961] 1 W.L.R. 1814.

⁸ *Chapman v. Hearse* (1961) 106 C.L.R. 112, at 115, *per* Dixon C.J.

⁹ *Fardon v. Harcourt-Rivington* (1932) 146 L.T. 391, at 392, *per* Lord Dunedin.

v. *Birmingham Water Works Co.*¹⁰ the defendants were held not guilty of negligence "because their precautions proved insufficient against the effect of the extreme severity of the frost of 1855, which penetrated to a greater depth¹¹ than any which ordinarily occurs south of the polar regions." Again, in *Bolton v. Stone*,¹² the plaintiff, while standing in the quiet suburban highway outside her house, was struck by a cricket ball¹³ from the defendant's ground, the batsman "having received the right kind of ball and dealt with it in the right kind of way."¹⁴ The plaintiff was 100 yards from the batsman and the ball had cleared a 17-foot fence 78 yards from the batsman. Similar hits had occurred only about six times in the previous thirty years. The House of Lords held that the plaintiff had not established such a likelihood of injury as to convict the defendants of negligence in failing to take precautions against it. It was improbable that the ball would be hit out of the ground or would cause personal injuries if it was.¹⁵ The decision established that, if an event is foreseeable, the antithesis of its being reasonably probable is that the possibility of its happening involves a risk so small that a reasonable man would feel justified in disregarding it.¹⁶ No doubt if cricket cannot be played on a ground without creating a substantial risk it must not be played there at all,¹⁷ but in this case the facts showed no substantial risk.¹⁸ So again defendants who did nothing were held to be justified in their attitude when a man was electrocuted in a way which was "most unexpected" in that particular trade¹⁹; or when every witness said that "he had never heard of an accident of this kind before."²⁰ The weight to be attached to the general practice

¹⁰ (1856) 11 Ex. 781.

¹¹ Unstated, but the mains were laid more than 18in. down.

¹² [1951] A.C. 850. See Goodhart, 67 L.Q.R. 461; Lloyd, 14 M.L.R. 499.

¹³ Preserved in the museum at Lord's.

¹⁴ *Booker v. Wenburn* [1962] 1 W.L.R. 162, at 168, per Lord Evershed M.R.

¹⁵ A claim in nuisance also failed: above, § 22. If the batsman had been sued in trespass, would the plaintiff have succeeded?

¹⁶ *Carmarthenshire County Council v. Lewis* [1955] A.C. 549, 565.

¹⁷ *Stone v. Bolton* [1950] 1 K.B. 201, 212; [1951] A.C. 850, 867.

¹⁸ "It seems to me that a reasonable man, taking account of the chances against an accident happening, would not have felt himself called upon either to abandon the use of the ground for cricket or to increase the height of his surrounding fences. He would have done what the appellants did: in other words, he would have done nothing": [1951] A.C. 850, at 869, per Lord Radcliffe.

¹⁹ *Cilia v. James (H. M.) & Sons (A Firm)* [1954] 1 W.L.R. 721, 728.

²⁰ *Cutress v. Scaffolding (G.B.) Ltd.* [1953] 1 W.L.R. 1311, 1316.

in such cases should, however, be borne in mind.²¹ It may well be that defendants are in a stronger position if the risk was so small that they had never thought about it but merely followed the usual practice than if they had considered it and decided that the risks were very small.²²

Unlikely hazards

On the other hand, it is not necessary that the chances that damage will result should be greater than the chances that no damage will occur.²³ "The test as regards foreseeability is not the balance of probabilities, but the existence, in the situation in hand, of some real likelihood of some damage and the likelihood is of such appreciable weight and moment as to induce, or which reasonably should induce, action to avoid it on the part of a person of reasonably prudent mind."²⁴ An occurrence may be unusual in the sense of infrequent and yet not unlikely.²⁵ Or a danger may be likely to arise and yet an accident unlikely to happen.²⁶ So the fact that the injury which has occurred is unique in character, or has happened previously on a minimal number of occasions, or to a very few people, does not necessarily prove that the defendant is under no duty to take precautions against it. Thus the fact that five million similar objects have been put in circulation without complaint is not conclusive²⁷; nor is the fact that thousands of persons have safely passed over the premises in question.²⁸ So in *Carmarthenshire County Council v. Lewis*²⁹ the appellants were held responsible when a four-year-old toddler escaped from their infants' school onto the highway and there caused the death of the respondent's husband,

²¹ Below, § 89.

²² *Morris v. West Hartlepool S.N. Co. Ltd.* [1956] A.C. 552, 568.

²³ *The Wagon Mound (No. 2)* [1968] 2 Lloyd's Rep. 408, 412.

²⁴ *Gulf Refining Co. v. Williams* (1938) 188 Miss. 723; 185 S. 284, at 286, per Griffith J.

²⁵ *Green v. Perry* [1955] A.L.R. 761.

²⁶ *Cade v. British Transport Commission* [1959] A.C. 256; Goodhart, 74 L.Q.R. 466.

²⁷ *Grant v. Australian Knitting Mills* [1936] A.C. 85.

²⁸ *Protheroe v. Railway Executive* [1951] 1 K.B. 376, 379; *Caminer v. Northern & London Investment Trust* [1951] A.C. 88, 111.

²⁹ [1956] A.C. 549. The degree of foresight expected of highway users is also considered below, § 89.

a lorry driver who had swerved to avoid running down the child and collided with a tree.³⁰

What exactly must be foreseen?

Finally, it is not necessary to show that the particular accident which has happened was foreseeable, any more than it is necessary to show that the particular damage was foreseeable; it is enough if it was reasonable in a general way to foresee the kind of thing that occurred.³¹ If it were necessary for the plaintiff to prove that the defendant ought to have foreseen the particular harm which in the event occurred, few actions for negligence would be successful. "The history of negligence is the history of the unexpected. The books are full of odd occurrences, strange conjunctions, and unpredictable contingencies."³²

This is particularly so when the plaintiff is an infant who has been tempted to meddle with some allurements.³³ Thus in *Hughes v. Lord Advocate*³⁴ a small boy interfered with a paraffin lamp marking a manhole cover in a street, and was severely burned when the lamp exploded. It was argued for the defendants that they were not responsible for a fire caused by combustion as distinct from conflagration, but the House of Lords held that on the facts this was too fine a distinction. The cause of the accident was a known source of danger behaving in an unpredictable way. *Hughes v. Lord Advocate* was distinguished in *Doughty v. Turner Manufacturing Co. Ltd.*³⁵ An asbestos cover was inadvertently knocked into a cauldron containing molten liquid at a temperature of 800°C. The asbestos suffered a chemical change causing the eruption of liquid which burned the plaintiff. This was an unforeseeable risk, and not a variant of the perils from splashing—a foreseeable risk.

(2) The importance of the object to be attained

The reasonableness of the defendant's conduct will also depend upon the proportion which the risk bears to the object

³⁰ Yet in the C.A. *Romer L.J.* had said that "almost superhuman vision" would have been required to foresee such an accident.

³¹ *Stewart v. West African Terminals Ltd.* [1964] 2 Lloyd's Rep. 371, 375.

³² *Bourhill v. Young*, 1941 S.L.T. 364, at 387, per Lord Justice-Clerk Aitchison. See also below, § 96.

³³ See below, § 112.

³⁴ [1963] A.C. 837.

³⁵ [1964] 1 Q.B. 518. Note that the leading judgment was given by Lord Pearce, who had been a member of the H.L. in *Hughes v. Lord Advocate*.

to be attained. To expose others to a risk of harm for a disproportionate object is unreasonable, whereas an equal risk for a better cause may be lawfully run without negligence. By running trains at the rate of 50 miles an hour railway companies have caused many fatal accidents which could quite easily have been avoided by running at 10 miles an hour. But this additional safety would be attained at too great a cost of public convenience, and therefore, in neglecting this precaution, the companies do not fall below the standard of reasonable care and are not guilty of negligence.³⁶ A different approach may be required if the object in view is of importance only to the defendant himself and not to the public. The saving of life or limb justifies taking risks which would not be permissible in the case of an ordinary commercial enterprise.³⁷

(3) The burden of adequate precautions

The general principle is that the risk has to be weighed against the measures necessary to eliminate it. If the risk is very remote, it is material to consider the degree of security which the suggested measures would afford: if in such a case the suggested measures are of an elaborate nature and would result only in a possibility that the accident would have been prevented or its consequences mitigated, then the defendants may be justified in doing nothing.³⁸ It is also relevant to consider the degree of risk (if any) which taking the precautionary measures may involve.³⁹ But the greater the risk the less should be the weight given to questions of the cost of precautionary measures in time, trouble or money.⁴⁰ If the risk to life or property is really substantial, and no precautions would avail against it, it

³⁶ *Daborn v. Bath Tramways Motor Co.* [1946] 2 All E.R. 333, 336. No doubt it was a relevant (if unexpressed) consideration in *Bolton v. Stone* that the activity promoted by the defendants was the English national game of cricket. As Dr. Goodhart observed (67 L.Q.R. 463), if a man reading in his chambers at midnight were to throw his book—or a cricket ball—out of the window in a fit of irritation he could hardly defend himself against an injured passer-by by alleging that such an injury was extremely unlikely.

³⁷ *Watt v. Hertfordshire County Council* [1954] 1 W.L.R. 835 (fireman).

³⁸ *Marshall v. Gotham Co. Ltd.* [1954] A.C. 360, 376.

³⁹ *Morris v. West Hartlepool S. N. Co. Ltd.* [1956] A.C. 552, 574, 579; *Hicks v. British Transport Commission* [1958] 1 W.L.R. 493, 505.

⁴⁰ *Morris v. Luton Corporation* [1946] 1 All E.R. 1, 4; *Edwards v. National Coal Board* [1949] 1 K.B. 704, 710; *Marshall v. Gotham Co. Ltd.* [1954] A.C. 360 (but observe Lord Keith of Avonholm's doubts).

may be the duty of the defendants to cease to carry on the particular activity in question.⁴¹

If the defendant is held to be under a duty to take certain precautions for the safety of the plaintiff he will not usually be permitted to excuse his failure to take those precautions by alleging that the accident would have happened even if he had fulfilled his duty. For if he had taken the necessary precautions (*e.g.*, provided a fence or safety belt in the case of an industrial accident) the plaintiff might have been deterred wholly or partially from encountering the risk.⁴²

§ 89. Particular Cases of Negligence

With these warnings in mind, we may consider some of the cases in which the courts have considered the duties owed by those engaged in particular professions, trades, or activities. We may take as examples medical men, schoolmasters, and users of the highway.

(1) Medical men ⁴³

Doctors, surgeons, and dentists owe to their patients a duty in tort as well as in contract.⁴⁴ It is expected of such a professional man that he should show a fair, reasonable and competent degree of skill; it is not required that he should use the highest degree of skill, for there may be persons who have higher education and greater advantages than he has, nor will he be held to have guaranteed a cure.⁴⁵ Although the standard is a high one, a medical practitioner should not be found negligent simply because one of the risks inherent in an operation of that kind occurs, or because in a matter of opinion he made an error of judgment,⁴⁶ or because he has failed to warn the patient of every

⁴¹ *Stone v. Bolton* [1950] 1 K.B. 201, 212; [1951] A.C. 850, 867; *Latimer v. A. E. C. Ltd.* [1953] A.C. 643.

⁴² *Williams v. Sykes & Harrison Ltd.* [1955] 1 W.L.R. 1180; *Hodkinson v. H. Wallwork & Co. Ltd.* [1955] 1 W.L.R. 1195. But see the doubts of Lord Evershed M.R. in *Haynes v. Qualcast Ltd.* [1958] 1 All E.R. 441, 445, and below, p. 366.

⁴³ See Eddy, *Professional Negligence*. The duty is also owed by an unqualified person who undertakes to cure another: above, § 87.

⁴⁴ See above, § 3.

⁴⁵ This sentence was cited with approval by Riley J. in *Challard v. Bell* (1959) 18 D.L.R. (2d) 150, at 152.

⁴⁶ *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582.

risk involved in a proposed course of treatment.⁴⁷ An important illustration may be found in *Roe v. Minister of Health*.⁴⁸ In 1947 the plaintiff had been injected with nupercaine, a spinal anaesthetic, by a specialist anaesthetist in order to undergo a minor operation. The nupercaine was contained in glass ampoules, which were in turn kept in a jar of phenol. Some of the phenol percolated through cracks in the ampoules and contaminated the nupercaine. As a result the plaintiff was permanently paralysed below the waist. The cracks in the ampoules were not detectable by ordinary visual or tactile examination. This was a risk which was first drawn to the attention of the profession in 1951: it would not have been appreciated by an ordinary anaesthetist in 1947. "Nowadays it would be negligence not to realise the danger, but it was not then."⁴⁹

(2) Schoolmasters

A schoolmaster is bound to take such care of his boys as a careful father would take of his sons.⁵⁰ This is generally known as the "careful parent test."⁵¹ It is somewhat higher than the common duty of care under the Occupiers' Liability Act, 1957.⁵² It is necessary to strike a balance between the meticulous supervision of children every moment of the time they are under the care of their schoolmaster and the very desirable object of encouraging the sturdy independence of children as they grow up.⁵³ It is not practicable to require constant supervision of children; only such supervision as is reasonable in the circumstances is

⁴⁷ *Smith v. Auckland Hospital Board* [1964] N.Z.L.R. 241.

⁴⁸ [1954] 2 Q.B. 66.

⁴⁹ *Per Denning L.J.* at 86. See the thought-provoking article by Sir Robert Macintosh (who first drew attention to this danger), *Deaths Under Anaesthetics* (1949) 21 *British Journal of Anaesthesia* 107. The 1962 Report of the Medical Defence Union (membership, 50,000) condemned many "deplorable blunders" in operations during the previous year, costing £79,000 in settlement of claims: *The Times*, September 24, 1962.

⁵⁰ *Rich v. L.C.C.* [1953] 1 W.L.R. 895, 900, 902.

⁵¹ *Durham v. Public School Board of North Oxford* (1960) 28 D.L.R. (2d) 711, 717.

⁵² *Reffell v. Surrey C.C.* [1964] 1 W.L.R. 358. This case also establishes that an action lies for breach of the statutory duty of care under s. 10 of the Education Act, 1944.

⁵³ *Jeffery v. L.C.C.* (1954) 52 L.G.R. 521.

required.⁵⁴ So the defendants were held liable when they failed to provide a guard for a gas stove at a cookery school attended by a girl of eleven.⁵⁵ But when the plaintiff, a schoolboy of fourteen years, was injured by a clod of earth thrown by another boy whilst they were "ragging" when helping a local farmer on a half-holiday, the defendant escaped liability.⁵⁶ "If every master is to take precautions to see that there is never ragging or horse-play among his pupils, his school would indeed be too awful a place to contemplate."⁵⁷ A prudent master should also take precautions against his boys causing injury to persons unconnected with the school.⁵⁸

(3) Users of the highway⁵⁹

An underlying principle of the law of the highway is that all those using it, or land adjacent to it, must show mutual respect and forbearance.⁶⁰ The duty of a driver of a vehicle is to use proper care not to cause injury to persons on the highway or in premises adjoining the highway.⁶¹ "Proper care connotes avoidance of excessive speed, keeping a good look-out, observing traffic rules and signals and so on."⁶² The duty is owed to persons so placed that they may reasonably expect to be injured by the omission to take such care.⁶³ In actions for personal injuries arising out of highway accidents it is particularly important to remember that the decision in every case turns upon its own facts—e.g., there is no rule of law that a person driving in the dark is negligent if he cannot stop within the

⁵⁴ *Clark v. Monmouthshire C.C.* (1954) 118 J.P. 244 (knives in playground). It may be otherwise if the child is very young: *Carmarthenshire C.C. v. Lewis* [1955] A.C. 549.

⁵⁵ *Fryer v. Salford Corporation* [1937] 1 All E.R. 617.

⁵⁶ *Camkin v. Bishop* [1941] 2 All E.R. 713.

⁵⁷ *Ibid.* at 716, *per* Goddard L.J. This case well illustrates the tendency to run together the questions of duty and standard of care. The Court of Appeal held that the defendant was under no duty to see that the boys whilst engaged upon such work were under supervision. It might as well or better have been held that the defendant was under a duty to take reasonable precautions for the safety of his pupils but that there was no evidence of failure to perform that duty.

⁵⁸ *Carmarthenshire C.C. v. Lewis* [1955] A.C. 549.

⁵⁹ Further information: Bingham, *Motor Claims Cases*.

⁶⁰ *Searle v. Wallbank* [1947] A.C. 347, 361.

⁶¹ *Bourhill v. Young* [1943] A.C. 92.

⁶² *Ibid.* at 104, *per* Lord Macmillan.

⁶³ *Bourhill v. Young* [1943] A.C. 92. Each user of the highway is owed a distinct duty: *Randolph v. Tuck* [1962] 1 Q.B. 175.

limit of his lights.⁶⁴ A failure on the part of any person to observe any provision of the Highway Code may in any civil proceedings be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.⁶⁵ A failure to observe the provisions of the Road Vehicles Lighting Regulations, 1955, will not of itself give a civil remedy to the injured party⁶⁶; nor will a breach of the Motor Vehicles (Construction and Use) Regulations, 1955⁶⁷; although in each case breach of the regulations may be relied upon as evidence of negligence. But an action lies against a party in breach of the Pedestrian Crossings Regulations, 1954.⁶⁸ The Road Traffic Act, 1960, s. 25, provides that the speed limit on motor-vehicles shall not apply to any vehicle used for police purposes: but this does not exempt the driver of such a vehicle from civil liability for negligence.⁶⁹ Finally, it should be remembered that a pedestrian owes a duty of care to other users of the highway⁷⁰; and a passenger in a vehicle, although no longer identified with the contributory negligence of his driver,⁷¹ may himself be guilty of negligence—*e.g.*, by opening a door which knocks over a pedestrian.⁷²

GENERAL PRACTICE

The general rule is that “a defendant charged with negligence can clear his feet if he shows that he has acted in accordance with the general and approved practice.”⁷³ So a man whose calling in life involves him in creating situations of danger will usually be justified in following the practice which his trade or profession has adopted or approved for dealing with such situations, and he will not be convicted of negligence merely because he has

⁶⁴ *Morris v. Luton Corporation* [1946] K.B. 114.

⁶⁵ Road Traffic Act, 1960, s. 74 (5); *Croston v. Vaughan* [1938] 1 K.B. 540.

⁶⁶ *Clarke v. Brims* [1947] K.B. 497.

⁶⁷ *Barkway v. South Wales Transport Co. Ltd.* [1950] 1 All E.R. 392.

⁶⁸ *London Passenger Transport Board v. Upson* [1949] A.C. 155.

⁶⁹ *Gaynor v. Allen* [1959] 2 Q.B. 403.

⁷⁰ *Nance v. British Columbia Electric Ry.* [1951] A.C. 601, 611.

⁷¹ Below, § 96.

⁷² Bingham, *Motor Claims Cases*, p. 147.

⁷³ *Vancouver General Hospital v. McDaniel* (1934) 152 L.T. 56, at 57, *per* Lord Alness. In *Whiteford v. Hunter* [1950] W.N. 553 the H.L. expressly approved this statement, though Lord MacDermott gave a warning that “such expressions beat the air and are meaningless unless used in relation to some particular condition or state of affairs.”

failed to make use of every precaution which ingenuity might suggest.⁷⁴ Yet in malpraxis cases it should be remembered that the mere fact that the defendant has deviated from the normal practice is not enough: many advances in medical science have been due to such deviations.⁷⁵ So it is probably not necessary for the defendant to show that the circumstances of his own case are precisely similar to those of the general practice.⁷⁶

Faults of omission

When the negligence complained of consists of what may be called a fault of omission,⁷⁷ “I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it.”⁷⁸ “The rule is stated with all the Lord President’s trenchant lucidity. It contains an emphatic warning against a facile finding that a precaution is necessary when there is no proof that it is one taken by other persons in like circumstances. But it does not detract from the test of the conduct and judgment of the reasonable and prudent man. If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will follow the usual practice in the like circumstances. Failing such proof the test is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it.”⁷⁹ The formulation of the law by Lord Dunedin has been applied for many years in scores of cases against employers and should not be discarded in favour of some milder version,⁸⁰ as there might be a temptation to do if the word “folly” is

⁷⁴ *Woods v. Duncan* [1946] A.C. 401 (naval officer); *Whiteford v. Hunter* [1950] W.N. 553 (surgeon).

⁷⁵ *Hunter v. Hanley*, 1955 S.C. 200, 206.

⁷⁶ *Cavanagh v. Ulster Weaving Co. Ltd.* [1960] A.C. 145, 158, 167.

⁷⁷ The distinction between acts of commission and acts of omission may be a fine one: *Cavanagh v. Ulster Weaving Co. Ltd.* [1960] A.C. 145, 165.

⁷⁸ *Morton v. William Dixon Ltd.*, 1909 S.C. 807, at 809, per Lord Dunedin.

⁷⁹ *Paris v. Stepney Borough Council* [1951] A.C. 367, at 382, per Lord Normand. Lord Normand did not intend in any way to qualify Lord Dunedin’s formula: *Morris v. West Hartlepool S. N. Co. Ltd.* [1956] A.C. 522; *Cavanagh v. Ulster Weaving Co. Ltd.* [1960] A.C. 145, 165–166.

⁸⁰ *Gallagher v. Balfour Beatty & Co. Ltd.*, 1951 S.C. 712, 717; *Morris v. West Hartlepool S. N. Co. Ltd.* [1956] A.C. 522.

thought to be equivalent to "ridiculous." But really it means no more than "imprudent" or "unreasonable."⁸¹ Lord Dunedin was in truth laying down no new principle of law but simply stating the factual framework within which the law must be applied⁸²—and the law is contained in the proposition that a master must take reasonable care for the safety of his servant.⁸³ The oft-cited formula does not mean that if a plaintiff calls no evidence of practice he must establish folly in order to make out a *prima facie* case.⁸⁴ Neither does it mean that if a practice is averred and proved which might have averted the accident, this is necessarily conclusive of negligence on the part of an employer who has not followed the practice.⁸⁵

Wisdom after the event

But the general practice itself may not conform to the standard of care required of a reasonably prudent man. In such a case it is not a good defence that the defendant acted in accordance with the general practice.⁸⁶ Neglect of duty does not cease by repetition to be neglect of duty.⁸⁷ It does not follow that one must wait for an accident or series of accidents before a system can be condemned as unsafe.⁸⁸ On the other hand, the fact that experience subsequent to the alleged negligence proves that some additional precaution was necessary does not in itself prove negligence at the earlier date. "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because

⁸¹ *Morris v. West Hartlepool S. N. Co. Ltd.* [1956] A.C. 522; *Cavanagh v. Ulster Weaving Co. Ltd.* [1960] A.C. 145, 162. This seems to answer the doubts of Fair A.-C.J. in *Donohue v. Union S.S. Co. Ltd.* [1951] N.Z. L.R. 862, 879, and of Dixon C.J. in *Hamilton v. NuRoof (W. A.) Pty. Ltd.* (1956) 96 C.L.R. 18.

⁸² *Cavanagh v. Ulster Weaving Co. Ltd.* [1960] A.C. 145, 166.

⁸³ See below, § 199.

⁸⁴ *Cavanagh v. Ulster Weaving Co. Ltd.* [1960] A.C. 145, 166.

⁸⁵ *Brown v. Rolls Royce Ltd.* [1960] 1 W.L.R. 210, 214.

⁸⁶ These two sentences were cited with approval in the joint judgment of Rich, Evatt, and McTiernan JJ. in *Mercer v. The Commissioner for Road Transport and Tramways (N.S.W.)* (1936) 56 C.L.R. 580, 593.

⁸⁷ *Carpenters Co. v. British Mutual Banking Co.* [1937] 3 All E.R. 811, 820.

⁸⁸ *Atkinson v. Tyne-Tees Steam Shipping Co. Ltd.* [1956] 1 Lloyd's Rep. 244.

the world gets wiser as it gets older, therefore it was foolish before.”⁸⁹ For it is easy to be wise after the event.⁹⁰

§ 90. The Proof of Negligence

The burden of proving negligence is on the plaintiff who alleges it. When accidental harm is done, if the action is case not trespass, it is not for the doer to excuse himself by proving that the accident was inevitable and due to no negligence on his part; it is for the person who suffers the harm to prove affirmatively that it was due to the negligence of him who caused it.⁹¹ Unless the plaintiff produces reasonable evidence that the accident was caused by the defendant's negligence, there is no case to go to the jury, and it is the duty of the judge to enter judgment for the defendant. The preliminary question for the judge is this: Is the evidence produced on behalf of the plaintiff (including the admissions of the defendant) of such weight that reasonable men (in the absence of, or leaving out of account, any evidence produced by the defendant to the contrary) might come to the conclusion that the accident was caused by the defendant's negligence? If so, the case must go to the jury; if not, judgment must be given for the defendant without the case being submitted to the jury at all.

No case to leave to jury

In thus withdrawing the case from the jury the judge does not substitute his own opinion as to the proof of negligence for their opinion; he decides, not that negligence has not been proved, but that no reasonable man or jury could think that it had been proved. The judge may be of opinion that there was no negligence, and yet be bound to leave the question to the jury, because it is one on which reasonable men might reasonably differ.⁹² On the other hand, it is not necessary to eliminate

⁸⁹ *Hart v. L. & Y. Ry.* (1869) 21 L.T. 261, at 263, *per* Bramwell B.

⁹⁰ *The Wagon Mound* [1961] A.C. 388, 424. *Cf.* *Pipe v. Chambers Wharf and Cold Stores Ltd.* [1952] 1 Lloyd's Rep. 194, 195 ("Nothing is so perfect that it cannot be improved"—*per* Streatfeild J.).

⁹¹ *Cotton v. Wood* (1860) 8 C.B.(n.s.) 568, at 571; *Metropolitan Ry. v. Jackson* (1877) 3 App.Cas. 193; *Jones v. G. W. Ry.* (1930) 144 L.T. 194.

⁹² *Bridges v. North London Ry.* (1874) L.R. 7 H.L. 213, 233-236. On this topic see Holmes, "Law in Science and Science in Law" (1900) 12 Harv. L.Rev. 443; *Collected Papers*, 233-238.

every conceivable possibility by which the accident may have been caused without negligence on the defendant's part.⁹³ The plaintiff's evidence must pass beyond the region of pure conjecture into that of legal inference⁹⁴ and a line must be drawn between suggestions of possible precautions and evidence of actual negligence fit to be left to a jury.⁹⁵ "The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible, but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof."⁹⁶ It follows that there can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish.⁹⁷ It is to be noticed that this question is to be decided not by weighing the evidence of the plaintiff against the defendant but by disregarding altogether the evidence of the defendant, and by asking whether that of the plaintiff is, *per se* and apart from any contradiction, sufficient or insufficient to bring conviction to a reasonable mind. The task of weighing the evidence on one side against that on the other belongs exclusively to the jury, and the only control exercised over them is the power of the court to order a new trial when the verdict is against the weight of evidence.⁹⁸ The judgment of Lord Cairns L.C. in *Metropolitan Ry. v. Jackson*⁹⁹ is a classical authority¹: "The judge has a certain duty to discharge, and the jurors have another and different duty. The judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether from these facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the

⁹³ *Gibby v. East Grinstead Gas Co.* [1944] 1 All E.R. 358, 362; *Horabin v. B.O.A.C.* [1952] 2 All E.R. 1016.

⁹⁴ *Jones v. G.W. Ry.* (1930) 144 L.T. 194.

⁹⁵ *Crafter v. Metropolitan Ry. Co.* (1866) L.R. 1 C.P. 300, 304.

⁹⁶ *Jones v. G.W. Ry.* (1930) 144 L.T. 194, at 202, *per* Lord Macmillan. The two preceding sentences were cited by Hutchison J. in *Union Steamship Co. of N.Z. Ltd. v. Wenlock* [1958] N.Z.L.R. 173, 177.

⁹⁷ *Caswell v. Powell Duffryn Collieries* [1940] A.C. 152, 169.

⁹⁸ See *Dublin Ry. v. Slattery* (1878) 3 App.Cas. 1155, 1162.

⁹⁹ (1877) 3 App.Cas. 193, at 197.

¹ It was cited with approval by four Law Lords in *Bill v. Short Bros. and Harland Ltd.* (1962) H.L., unreported.

administration of justice that these separate functions should be maintained, and should be maintained distinct. . . . It would . . . place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever. To take the instance of actions against railway companies: a company might be unpopular, unpunctual, and irregular in its service; badly equipped as to its staff; unaccommodating to the public; notorious, perhaps, for accidents occurring on the line; and when an action was brought for the consequences of an accident, jurors, if left to themselves, might, upon evidence of general carelessness, find a verdict against the company in a case where the company was really blameless." Thus in *Wakelin v. London and S.W. Ry.*² the dead body of the plaintiff's husband was found lying on the railway line at a level crossing, having been run over by a train which carried a head-light but did not whistle as it approached the crossing. No evidence was produced as to how the deceased came to be on the line. It was held by the House of Lords that there was no case to go to a jury; that even assuming that there was sufficient evidence of negligence (*viz.*, the failure to whistle), there was no evidence that this was the cause of the accident. "One may surmise," said Lord Halsbury L.C.,³ "and it is but surmise and not evidence, that the unfortunate man was knocked down by a train while on the level crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to show that the train ran over the man rather than that the man ran against the train?"

Submission of no case to answer

In cases which are tried by a judge sitting alone the judge is bound to put counsel who has submitted that there is no case to answer to his election whether he wants to stand on the submission or call his evidence before a ruling on the submission is given.⁴ If the judge rules in favour of the defendant, but on appeal the plaintiff establishes that there was a case to answer, he is entitled to judgment and the court has no power to order a

² (1886) 12 App.Cas. 41.

³ 12 App.Cas. 41, at 45.

⁴ *Young v. Rank* [1950] 2 K.B. 510; *Storey v. Storey* [1961] P. 63.

new trial. "That follows logically from the principle that the defendant, having elected to call no evidence, is bound by that election, and therefore cannot be given a new trial at which to call evidence that he ought to have called at the hearing."⁵ Conversely, if the judge rules against the defendant, but the latter elects to give evidence and has judgment given against him, he cannot ask the Court of Appeal to disregard the evidence so given.⁶ But in a jury action the judge probably has a discretion whether he will put counsel to his election, which he need not exercise until the evidence is concluded.⁷

*Onus of proof when several defendants*⁸

The rule that the plaintiff must prove that the defendant's negligence was the cause of the accident may cause difficulties if the acts of two or more defendants are involved. While it is plain that the trial judge is entitled to dismiss the claim if there is no evidence from which negligence can be inferred on the part of one or the other or both of the defendants, it has also been held that if A has been injured in circumstances which must have been due to the negligence of B or C, but he is unable to establish which of them is responsible, then the onus of proof is on the wrongdoing defendant to exculpate himself. If he fails to do so, the plaintiff may recover against both defendants.⁹ But this principle might cause great hardship to an innocent defendant in a case in which the damage must have been caused by one or other of the defendants, but could not possibly have been caused by both.¹⁰ Hence it probably applies only when the defendants are joint tortfeasors, either as being engaged on a concerted common design, or as persons of whom one is vicariously liable for the acts of the other.¹¹ Thus when the plaintiff has suffered harm as a result of a negligent system of manufacture, inspection or repair adopted by the defendant, he is not required

⁵ *Goulding v. Ministry of Works* (unreported) 1955 C.A. 175A, *per Jenkins* L.J. But in *Storey v. Storey* [1961] P. 63 an exception is suggested.

⁶ *Payne v. Harrison* [1961] 2 Q.B. 403.

⁷ *Payne v. Harrison* [1961] 2 Q.B. 403.

⁸ See Hogan, "Cook v. Lewis Re-examined" (1961) 24 M.L.R. 331.

⁹ *Cook v. Lewis* [1952] 1 D.L.R. 1; *Wotta v. Haliburton Oil Well Cementing Co. Ltd.* [1955] 2 D.L.R. 785.

¹⁰ *Power v. Bedford Motor Co. Ltd.* [1959] I.R. 391, 418-420.

¹¹ *Cassidy v. Ministry of Health* [1951] 2 K.B. 343, 359; *Roe v. Minister of Health* [1954] 2 Q.B. 66, 80, 82, 88; *Walsh v. Holst & Sons, Ltd.* [1958] 1 W.L.R. 800, 804.

to lay his finger on the exact person in the whole chain who is responsible.¹² Again when there is a highway collision between two motor-cars in circumstances which give rise to a *prima facie* case of negligence against each (*e.g.*, a head-on collision in broad daylight), in the absence of any evidence enabling the court to distinguish between them, the proper course is for the court to say: both to blame and equally to blame.¹³

Appeals

The powers of the Court of Appeal are wider in the case of a judge of the High Court sitting alone than in the case of an appeal from the verdict of a jury. It must be noted that the vast majority of civil actions are today tried by a judge alone.¹⁴ It has been held that in a personal injuries claim a jury should be ordered only in exceptional circumstances,¹⁵ even if, or perhaps because, the injury is serious.¹⁶ In *Benmax v. Austin Motor Co. Ltd.*¹⁷ the House of Lords pointed out that on an appeal it is necessary to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found or, as has sometimes been said, between the perception and evaluation of facts. Thus an appellate court will be reluctant to reject a finding of specific fact which may be founded on the credibility¹⁸ of a witness¹⁹; but "in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as

¹² *Grant v. Australian Knitting Mills* [1936] A.C. 85, 101.

¹³ *Baker v. Market Harborough Co-operative Society Ltd.* [1953] 1 W.L.R. 1472; *Shiner v. Webster* (unreported) 1955 C.A. 140, *per* Denning L.J. The drivers are not, of course, joint tortfeasors.

¹⁴ *The Civil Judicial Statistics*, published annually by H.M.S.O., show that in 1961 only 30, and in 1962 only 38, cases were heard with a jury in the Q.B.D. In five of the Australian states jury trial in motor cases has been abolished. It still prevails in North America: for severe criticism of it, see Prosser, *Torts*, p. 560.

¹⁵ *Ward v. James* [1965] 2 W.L.R. 455.

¹⁶ *Watts v. Manning* [1964] 1 W.L.R. 623.

¹⁷ [1955] A.C. 370. See Goodhart, "Appeals on Questions of Fact" (1955) 71 L.Q.R. 402.

¹⁸ Is there a distinction between veracity and reliability? Lord Tucker said there was in *Wilts & Dorset Motor Services Ltd. v. Kitto* (1961) H.L. Unreported.

¹⁹ Although "If it could be shown that the course of events affirmed by the learned judge could not have occurred, that would be an excellent reason for reversing his view—in these mundane happenings there is no more conclusive argument than *non est credendum quia impossibile*": *The Eurymedon* (1942) 78 Ll.L.R. 217, at 219, *per* Viscount Simon L.C.

good a position to evaluate the evidence as the trial judge, and ought not to shrink from the task, though it ought, of course, to give weight to his opinion.”²⁰ While it is useful to have such clear and authoritative guidance, it may perhaps be regretted that the law should have been laid down in such very wide terms. The reports contain many cases in which judges of the greatest eminence have differed as to the evaluation of admitted facts²¹ and if appellate tribunals are to make full use of the powers given to them by *Benmax v. Austin Motor Co. Ltd.* the uncertainty of the law will greatly increase. But when the trial has been before a jury, then provided that there was evidence to go to the jury in the sense explained above, and no misdirection by the judge, the verdict can be set aside only if it is one which no reasonable men might have found on those facts.²² By the County Courts Act, 1955, s. 12, a right of appeal is given from the decision of a county court judge on a question of fact.

Negligence a question of fact

At one time it was regarded as well established that the only use of cases was for the propositions of law which they contained, and that it was no use to compare the facts of one case with those of another to see what decision should be arrived at in the latter. But this simple view became obscured as the law of negligence grew increasingly complicated. In particular, the disappearance of the civil jury meant that trials before a judge sitting alone became longer and more elaborate,²³ and the judgments themselves correspondingly lengthier. A judge sitting alone feels obliged, unlike a jury, to explain why he is accepting or rejecting each of the arguments of counsel. Hence there was a natural but erroneous tendency to think that when a judge gave reasons for his decision he was laying down rules of law.²⁴

²⁰ [1955] A.C. 370, at 376, *per* Lord Reid.

²¹ *e.g.*, *Carmarthenshire C.C. v. Lewis* [1955] A.C. 549; *Morris v. West Hartlepool Steam Navigation Co. Ltd.* [1956] A.C. 552; *Ross v. Associated Portland Cement Manufacturers Ltd.* [1964] 1 W.L.R. 768.

²² *Metropolitan Ry. v. Wright* (1886) 11 App.Cas. 152.

²³ In 1930 two hours were sufficient to try the ordinary common law action: today few such cases last less than five hours.

²⁴ It is instructive to compare the judgments on torts of a century ago with those of today. It is not only that Erle or Blackburn or Willes were right in the result—but their reasons were expressed with a clarity, simplicity and brevity rarely found today. Yet these judges had been trained under a system of pleading notorious for its verbosity and complexity.

But the House of Lords has called a welcome halt to this process. In *Qualcast Ltd. v. Haynes*²⁵ it was emphatically reaffirmed that reasons given for decisions on questions of fact are not binding on future judges. The reports should not, therefore, be ransacked to discover isolated sentences with which to support an argument, for owing to the great number of cases on negligence the "tests have been examined, discussed, and described in language either sober or picturesque."²⁶

§ 91. *Res Ipsa Loquitur*²⁷

The rule that it is for the plaintiff to prove negligence, and not for the defendant to disprove it, is in some cases one of considerable hardship to the plaintiff, because it may be that the true cause of the accident lies solely within the knowledge of the defendant who caused it. The plaintiff can prove the accident, but he cannot prove how it happened so as to show its origin in the negligence of the defendant. This hardship is avoided to a considerable extent by the principle of *res ipsa loquitur*. There are many cases in which the accident speaks for itself, so that it is sufficient for the plaintiff to prove the accident and nothing more. He is then entitled to have the case submitted to the jury, and it is for the defendant, if he can, to persuade the jury that the accident arose through no negligence of his. The maxim *res ipsa loquitur* applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused. "There must be reasonable evidence of negligence," said Sir William Erle C.J., delivering the judgment of the Court of Exchequer Chamber²⁸ in the leading case of *Scott v. London and St. Katherine Docks Co.*,²⁹ "but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in

²⁵ [1959] A.C. 743.

²⁶ *Booker v. Wenborn* [1962] 1 W.L.R. 162, at 172, *per* Danckwerts L.J.

²⁷ See Ellis Lewis, "A Ramble with *res ipsa loquitur*" (1961) 11 Camb.L.J. 74; O'Connell, "*Res Ipsa Loquitur*" [1954] C.L.J. 118.

²⁸ Erle C.J., *Crompton, Byles, Blackburn, Keating and Mellor JJ.*

²⁹ (1865) 3 H. & C. 596, at 601 (six bags of sugar falling from warehouse on to passer-by).

the absence of explanation by the defendant, that the accident arose from want of care." It is characteristic of the great Victorian masters of the common law who framed these limpid sentences (which constitute the whole of the relevant part of the court's judgment) that they should have avoided both lengthy elaboration of the obvious and the use of the Latin maxim *res ipsa loquitur*.³⁰ These temptations have not always been resisted by their successors, with the result that the law on this topic is still curiously complex and uncertain. First, it should be observed that when all the facts are known there is no room for the application of the maxim: in such a case the only question is whether an inference of negligence becomes practically certain or practically impossible.³¹ Secondly, when all the facts are not known the maxim helps the plaintiff to discharge the onus which lies upon him of proving negligence. So two distinct questions arise: (1) what are the conditions for the operation of the principle contained in the maxim? and (2) what is the effect of the operation of the principle, once it has been properly invoked?

(1) Conditions for operation of principle

The court in *Scott v. London and St. Katherine Docks Co.* stipulated (i) that "the thing is shown to be under the management of the defendant or his servants," and (ii) that "the accident is such as in the ordinary course of things does not happen if those who have the management use proper care." As to (i), it is sufficient here to note that the driver of a motor-vehicle is now held (contrary to earlier opinions) to have sufficient control over his vehicle and its surrounding circumstances to attract the operation of the principle in a suitable case.³² When an object or operation is under the control of two (or more) persons not legally responsible for the acts of each other it is probable that the principle does not apply.³³ As to (ii), it is part of the common experience of mankind that if those who have control are exercising reasonable care, it is

³⁰ "If it had not been in Latin nobody would have called it a principle": *Ballard v. N. B. Ry. Co.*, 1923 S.C. 43, at 56, per Lord Shaw.

³¹ *Barkway v. South Wales Transport Co.* [1950] 1 All E.R. 392, 395; *Bolton v. Stone* [1951] A.C. 850, 859.

³² *Halliwell v. Venables* (1930) 99 L.J.K.B. 353. Contrast *Easson v. L. N. E. R.* [1944] K.B. 421 (doors of London-Edinburgh express not continuously under company's control).

³³ See above, § 90.

not usual for bags of flour to fall from warehouse windows³⁴ or for stones to be found in a bun³⁵—to mention only a few of the many cases in which the doctrine has been held to apply.³⁶ On the other hand, "Everybody knows fires occur through accidents which happen without negligence on anybody's part,"³⁷ so there was no liability when an ordinary domestic fire was left burning in a grate and the room was set on fire in some unexplained way. It has been said that this condition is of vital importance and fully explains why *res ipsa loquitur*.³⁸ A difficulty has arisen where negligence is alleged against surgeons or doctors, for it has been said that as a judge can have no personal knowledge of "the ordinary course of things" in, e.g., a complex abdominal operation, the maxim cannot apply in such cases.³⁹ But the better view is that, properly understood, the maxim may be of help even when the exercise of professional skill is under consideration.⁴⁰

(2) Effect of operation of the principle

In a case in which the operation of the principle contained in the maxim *res ipsa loquitur* has been properly invoked the primary and fundamental effect is that the plaintiff is entitled to have his case left to the jury, so that if he has been non-suited by the trial judge a new trial will be ordered on appeal.⁴¹ The secondary effect is that once the case has been properly left to the jury, the mere happening of the accident affords "reasonable evidence, in the absence of explanation by the defendant," that it

³⁴ *Byrne v. Boadle* (1863) 2 H. & C. 722 (perhaps the first case in which the phrase *res ipsa loquitur* occurs). From a practical point of view, the importance of such a decision is that it dispenses the plaintiff from the necessity of calling witnesses from inside the warehouse to prove negligence.

³⁵ *Chapronière v. Mason* (1905) 21 T.L.R. 633.

³⁶ A useful summary of the decisions is in Charlesworth, *Negligence*, pp. 114–28.

³⁷ *Sochacki v. Sas* [1947] 1 All E.R. 344, at 345, per Lord Goddard C.J.

³⁸ *Mummery v. Irvings Proprietary Ltd.* (1956) 96 C.L.R. 99, 116.

³⁹ *Mahon v. Osborne* [1939] 2 K.B. 14, 23.

⁴⁰ *Cassidy v. Ministry of Health* [1951] 2 K.B. 343.

⁴¹ See Evatt J. in *Davis v. Bunn* (1936) 56 C.L.R. 246, 268–269 (the clearest judicial discussion of the whole matter). This was precisely the course of events in both *Byrne v. Boadle* and *Scott v. London, etc. Docks Co.*—though the difficulty of these matters is shown by the fact that in the latter case Erle C.J. dissented from his brethren on the application of the principle to the facts. In fact, when the case was re-tried, the verdict was for the defendants (13 L.T.(N.S.) 148)—which shows very clearly that when the maxim applies the plaintiff is entitled to have a trial, but is not entitled to win it.

was due to the defendant's negligence. Hence if the defendant gives no evidence a verdict for the plaintiff will stand. So clearly a prudent defendant will feel obliged to offer an "explanation." Opinions have differed as to the nature of the onus which rests upon him. It is well settled that the defendant is entitled to succeed even though he cannot explain exactly how the accident happened if he establishes that there was no lack of reasonable care on his part.⁴² The difficulty arises when the defendant is still unable to explain the accident and his conduct is open to more than one interpretation. It is submitted that there is not, even where *res ipsa loquitur*, any legal presumption of negligence, so that the legal burden of disproving it lies on the defendant. Therefore if the defendant produces a reasonable explanation, equally consistent with negligence and no negligence, the burden of proving the affirmative, that the defendant was negligent and that his negligence caused the accident, still remains with the plaintiff.⁴³ On the other hand, it has been held by the Court of Appeal that the onus of disproving negligence lies on the defendant, at least in the sense that it is not sufficient for him to show that there were several hypothetical causes consistent with an absence of negligence, but he must go further and show either that the accident was due to a specific cause which does not connote his negligence, or that he had used all reasonable care in the matter.⁴⁴ But if this latter view were adopted, it would mean that a plaintiff who establishes a *prima facie* case by invoking the maxim would be in a stronger position than one who made out a *prima facie* case in another way.⁴⁵ It is

⁴² *Woods v. Duncan* [1946] A.C. 401 (see above, p. 276) is perhaps the clearest example of this. See also *Walsh v. Holst & Co. Ltd.* [1958] 1 W.L.R. 800.

⁴³ This sentence was cited with approval by Evatt J. in *Davis v. Bunn* (1936) 56 C.L.R. 246, 267. This is the view adopted in Australia: *Mummery v. Irvings Proprietary, Ltd.* (1956) 96 C.L.R. 99.

⁴⁴ *Moore v. Fox (R.) & Son Ltd.* [1956] 1 Q.B. 596. In New Zealand the balance of authority seems to favour this view: *Heywood & Co. Ltd. v. Att.-Gen.* [1966] N.Z.L.R. 668, which is also approved by Chapman, 78 L.Q.R. 408, but not by Braybrooke, 4 Univ.W.A. Ann.L.Rev., 209.

⁴⁵ *Mummery v. Irvings Proprietary Ltd.* (1956) 96 C.L.R. 99, 121. It would really put the plaintiff in the same position as if the action were one of trespass, in which the defendant would have to plead and prove inevitable accident, whereas the general rule in negligence is that the plaintiff must establish his case and the defendant need do no more than plead a general denial: see Devlin J. in *Southport Corporation v. Esso Petroleum Co., Ltd.* [1953] 8 W.L.R. 773, 781 (the point is not discussed in the H.L.).

suggested that much of the confusion is due to a failure to appreciate that cases where *res ipsa loquitur* applies may vary enormously in the strength, significance and cogency of the *res* proved.⁴⁶ There are many cases in which the most eminent judges have been divided on the question whether an inference of negligence could properly be drawn from the facts proved or admitted. Looked at in this light, it is not easy to see why the maxim should be treated as a special part of the law of evidence.

§ 92. Contributory Negligence: Preliminary

The rules relating to contributory negligence once comprised one of the most difficult branches of the law. "No more baffling and elusive problem exists in the law of torts," wrote Salmond in 1923.⁴⁷ Fortunately, however, the Law Reform (Contributory Negligence) Act, 1945, and several decisions of the highest courts, have introduced a straightforward and comprehensive body of principles in place of a mass of subtle arguments and tedious refinements. The account which follows is intended to contain no more than is necessary for an understanding of the present law,⁴⁸ though, as usual in the common law, a little must be said about the historical background.

The present law of contributory negligence is derived from more than one source. In particular it embodies two distinct principles which do not always harmonise. The doctrine that if the plaintiff's act was the proximate cause of the damage the plaintiff could not recover was a well-established principle of medieval law. In the sixteenth and seventeenth centuries the conception of negligence as a ground of liability worked its way into the common law. With the recognition of negligence as a ground of liability a practice grew up of alleging that a plaintiff

⁴⁶ *Davis v. Bunn* (1936) 56 C.L.R. 246, 267-268; *Easson v. L. N. E. Ry.* [1944] K.B. 421, 425.

⁴⁷ Preface to 6th ed., p. viii. An undergraduate once got high marks for writing in an examination paper: "Every judge whom I have met assures me that the law of contributory negligence is perfectly simple, but I notice that they are all reversed on appeal!"

⁴⁸ Further information: Williams, *Joint Torts and Contributory Negligence*; Goodhart, "The Last Opportunity Rule" (1949) 65 L.Q.R. 237; Wright, "Contributory Negligence" (1950) 13 M.L.R. 2; MacIntyre, "Last Clear Chance after Thirty Years" (1955) 33 Can. Bar. Rev. 257; Payne, "Damages for Contributory Negligence" (1955) 18 M.L.R. 344.

could not recover because he was debarred by his own negligence. So we find a penal theory of contributory negligence.⁴⁹ In the same way it is common to speak of a plaintiff as being "guilty" of contributory negligence. But the penal theory is inconsistent with the application of the law by the courts. A plaintiff may have been ever so negligent at some stage of the proceedings, but he will be able to recover if his negligence did not contribute to the accident, even if his negligence was criminal. And the penal theory breaks down again in those cases where the defendant had the last opportunity of avoiding the accident. On the other hand, the doctrine of contributory negligence is more than an application of the rule as to remoteness of damage. For if a third party is injured the negligence of each—both the plaintiff and the defendant—is treated as a cause of the accident: each is liable to the third party.⁵⁰ Again, where before the Act of 1945 the acts of negligence were contemporaneous, the plaintiff could not recover, even if the defendant's negligence had been equally a cause of the accident, because he had to prove that the negligence of the defendant was the sole cause of the damage. Nor is the defence of contributory negligence an application of the maxim *volenti non fit injuria*, although the two principles often concur and have often been confused.⁵¹ The defence of contributory negligence confesses and avoids a *prima facie* liability, it excludes the idea of deliberation, and relies upon the failure of the plaintiff to exercise reasonable care. Of the defence that the plaintiff has willed to run the risk none of these statements is true.

§ 98. Contributory Negligence: the Common Law

"The rule of law," said Lord Blackburn,⁵² "is that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls." Thus in

⁴⁹ See *Wakelin v. L. S. W. Ry.* (1886) 12 App.Cas. 41, 45.

⁵⁰ *M'Kenna v. Stephens and Hull* [1928] 2 I.R. 112; *Grant v. Sun Shipping Co.* [1948] A.C. 549, 568-564. Cf. the cases on the doctrine of identification, below, § 96. See Williams, *Contributory Negligence*, s. 62; and the valuable anonymous brochure published in Tasmania in 1936 and entitled *Contributory Negligence and Third Parties*.

⁵¹ See also above, § 18.

⁵² *Cayzer, Irvine & Co. v. Carron Co.* (1884) 9 App.Cas. 873, at 881.

*Butterfield v. Forrester*⁵³ the defendant wrongfully obstructed a street in Derby by placing a pole across it, and the plaintiff rode along the street "at eight o'clock in the evening of August, when they were just beginning to light candles," but while there was still sufficient light to notice the obstruction, and coming into collision with the pole he was thrown from his horse and injured. It was held that he had no cause of action, as he could, notwithstanding the defendant's negligence, have avoided the accident by the use of due care. Lord Ellenborough C.J. said: "One person being in fault will not dispense with another's using ordinary care for himself. Two things must occur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

PRINCIPLE IN *DAVIES v. MANN*

It soon became apparent however, that there were cases where there was so substantial a difference between the position of the two parties at the material time that, although the accident would not have occurred without the plaintiff's negligence, it would not be fair or reasonable to regard him as the author of his own wrong. This is the fundamental (though seldom openly expressed) idea behind a series of cases which begin with *Davies v. Mann*.⁵⁴ In this case the plaintiff negligently left his donkey, with its legs tied, in the highway. The defendant, driving his waggon and horses "at a smartish pace," crashed into the animal and killed it. It was held that the defendant was liable—notwithstanding the fact that the accident would not have happened but for the negligence of the plaintiff—on the ground that the defendant had a sufficient opportunity of avoiding by the use of reasonable care the danger so created by the plaintiff's negligence. "Although the ass may have been wrongfully there," said Parke B.,⁵⁵ "still the defendant was bound to go along the road at such a pace as would be likely

⁵³ (1809) 11 East 60. This case is commonly cited as the source of the doctrine but the term "contributory negligence" is not used in it and the conception can be traced further back: *Winfield, Tort*, p. 230.

⁵⁴ (1842) 10 M. & W. 546.

⁵⁵ *Ibid.* at 549. ("Probably the most acute and accomplished lawyer this country ever saw": *Brinsmead v. Harrison* (1871) L.R. 7 C.P. 547, at 554, *per Blackburn J.*)

to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road." In this case the expression "contributory negligence" was not used, nor is it clear whether the defendant did or did not see the ass; he probably did see it but too late.⁵⁶ *Davies v. Mann* was approved by the House of Lords in *Radley v. L. & N. W. Ry.*⁵⁷

Salmond invents the last opportunity rule

The doctrine laid down in these cases with the object of mitigating the harshness of the original common law rules has often been called (although not in the cases themselves) the doctrine, or rule, of the "last opportunity," the "last clear opportunity," or the "last clear chance." Indeed, the first person to use the term appears to have been Salmond himself. Writing in 1912⁵⁸ he summarised the effect of the cases at that time in the following words⁵⁹: "*Ex hypothesi* in all cases of contributory negligence the defendant has been guilty of negligence which caused the accident: therefore in all cases he could by the exercise of reasonable care have avoided the accident; and therefore . . . he is liable notwithstanding the contributory negligence of the plaintiff. Clearly, therefore, something more than a mere opportunity of avoiding the accident by reasonable care is required in order to bring the rule in *Davies v. Mann* into operation. . . . Subject to certain qualifications, it would seem that the true test is the existence of the last opportunity of avoiding the accident. . . ."⁶⁰ Accepting the foregoing conclusions, the rule in *Davies v. Mann* may be formulated thus: The contributory negligence of the plaintiff is no defence if the defendant had a later opportunity than the plaintiff of avoiding the accident

⁵⁶ This is the accepted view. Rand J. thought he did not: *Bruce v. MacIntyre* [1955] 1 D.L.R. 785, 787. The collateral report in 6 Jur. 954 makes it clear that the defendant was some distance behind his horses (presumably on foot) at the moment of collision.

⁵⁷ (1876) 1 App.Cas. 754.

⁵⁸ Third ed., pp. 39-43; cf. 6th ed., pp. 40-42.

⁵⁹ Which were cited with approval by the High Court of Australia, in *Alford v. Magee* (1952) 85 C.L.R. 437, 456.

⁶⁰ "What the defendant has to avoid is, not the consequences of the plaintiff's negligence, but the accident, which is the consequence of the combined effect of his own and of the plaintiff's negligence, and without both of which it would not have happened": *Neenan v. Hosford* [1920] 2 I.R. 268, at 291, *per* Ronan L.J. It is put thus in all the best authorities.

by reasonable care, and at the time either knew or ought to have known of the danger caused by the plaintiff's negligence. Combining this rule with the general principle of contributory negligence, we reach the following result: When an accident happens through the combined negligence of two persons, he alone is liable to the other who had the last opportunity of avoiding the accident by reasonable care,⁶¹ and who then knew or ought to have known of the danger caused by the other's negligence."

Modification of principle

This admirable passage is open to discussion on two points. First, it necessarily required modification in later editions in order to accommodate the strange case of *British Columbia Electric Ry. v. Loach*.⁶² The facts of that case were as follows: An action was brought against a railway company by the administrator of a man who, while being driven in a waggon across a level crossing, was run down and killed by an electric car. The deceased was guilty of negligence in failing to look out for the car before entering upon the line.⁶³ The company was also guilty of negligence in running the car at an excessive speed and with a defective brake. The driver saw the horses as they came into view from behind a shed, when they were 10 or 12 feet from the nearest rail, and he at once applied his brake. He was then 400 feet from the crossing, and if the brake had been in good order he could have stopped the car in 300 feet. In fact, however, the brake was out of order, and the car overran the crossing and ran the waggon down. The Judicial Committee held the railway company liable, notwithstanding the negligence of the deceased. From *Loach's* case it appears that a last opportunity which the defendant would have had but for his own

⁶¹ This sentence was cited by Scrutton L.J. in *Service v. Sundell* (1929) 99 L.J.K.B. 55.

⁶² [1916] 1 A.C. 719.

⁶³ The case, as Scrutton L.J. pointed out in *Compania Mexicana de Petroleo v. Essex Transport Co.* (1929) 141 L.T. 106, 112, is a "very odd" one, because it suggests that a passenger is bound to take extraordinary precautions to see that the road is clear. Yet a passenger is no longer identified with his driver. The fact that the deceased was a passenger escaped Lord Wright in his judgment in *McLean v. Bell* (1932) 147 L.T. 262, 264.

negligence is equivalent in law to one which he actually had.⁶⁴ He will not be suffered to say that he had not the last opportunity, if he would have had it had he not disabled himself by some prior act of negligence.

Secondly, Salmond's use of the phrase "the last opportunity" was understood as suggesting that such an opportunity must have been always available to one or other of the parties. Although "this is clearly remote from what the author meant,"⁶⁵ such a view seems at one time to have been widely held and led to juries being directed on the subject of last opportunity in a misleading way or in cases in which it ought not to have been mentioned at all. The fallacy of the notion that the test of the last opportunity was a rule of law applicable over the whole field of contributory negligence can be demonstrated most readily by reference to the very common case of a highway collision between two modern fast-moving vehicles, for here the maximum period of time available to either party for avoiding the accident is seldom as much as a few seconds.⁶⁶ Yet it was in just such a case that the House of Lords was invited to say that Humphreys J. had misdirected a Cambridge special jury by refusing to leave to them the issue of the last opportunity and asking them instead to answer the simple question: Whose negligence was it that substantially caused the injury?⁶⁷ But the House held that in the circumstances of that case (a crossroads collision between a car and a motor-cycle) that was a sufficient direction.⁶⁸ Henceforward this interpretation of

⁶⁴ Few decisions given by so eminent a tribunal (Lord Sumner delivered the judgment of a board composed of himself, Lord Haldane and Lord Parker of Waddington) have given rise to so much criticism. It has been noticed that the courts have never applied the doctrine in *Loach's* case against a plaintiff guilty of antecedent negligence. If A, lying drunk in the road, is run over by B in broad daylight it has been agreed since *Davies v. Mann* that B is responsible: yet A by getting drunk has deprived himself of the last opportunity of avoiding the accident. "The truth is that no one knows precisely what it settled": Williams, *Contributory Negligence*, p. 234. See also the (dissenting) judgment of Black J. in *Minister of Finance v. O'Brien* [1949] I.R. 91. Yet it seems to have been adopted by the House of Lords in *McLean v. Bell* (1932) 147 L.T. 262; but see Goodhart, 65 L.Q.R. 254.

⁶⁵ *Alford v. Mages* (1952) 85 C.L.R. 437, 457.

⁶⁶ See *Gomersall v. Yole* [1954] V.L.R. 269.

⁶⁷ *Swadling v. Cooper* [1931] A.C. 1.

⁶⁸ Yet it should be noticed that the jury returned to court and told the judge that they did not understand it. (This lends point to the remarks of du Parcq L.J. in *Gibby v. East Grinstead Gas Co.* [1944] 1 All E.R. 358, 363: "Unless the trial had taken place in a university city and it had

the rule of last opportunity became increasingly suspect and finally in *Boy Andrew (Owners) v. St. Rognvald (Owners)*,⁶⁹ Lord Simon said: "The principle of *Davies v. Mann* has often been explained as amounting to a rule that when both parties are careless, the party which has the last opportunity of avoiding the results of the other's carelessness is alone liable. The suggested test of 'last opportunity' seems to me inaptly phrased and likely in some cases to lead to error, as the Law Revision Committee said in their report (Cmd. 6082 of 1939, p. 16): 'In truth, there is no such rule—the question, as in all questions of liability for a tortious act, is, not who had the last opportunity of avoiding the mischief, but whose act caused the wrong?' " A number of other judicial statements of high authority⁷⁰ have made it clear that the rule of last opportunity, in this incorrect sense of the term, suffered a demise quite independently of the Act of 1945.⁷¹ Indeed, it may well be that in this sense the rule was never really law at all, for it seems to have been adopted in no case of good authority in any jurisdiction

happened that the jury was composed mainly of philosophers and logicians, I doubt if a discussion of theories of causation would have either assisted or interested them.") The jury's difficulty was no doubt caused by the fact that although the question was perfectly sensible they could not (as the law then stood) return a sensible answer to it. For if they replied: "They both caused it," as they would rightly wish to do, and did, the plaintiff would recover nothing—as in fact happened.

⁶⁹ [1948] A.C. 140, at 148–149. (In [1947] 2 All E.R. 850, *sub nom.* (more correctly) *Admiralty Commissioners v. North of Scotland & Orkney & Shetland Steam Navigation Co.*)

⁷⁰ Speaking of the period after *Swadling v. Cooper*, Lord du Parcq said: "But the 'rule of the last opportunity' still haunted the courts. I well remember the pained expression which used to appear on the faces of some counsel when, as a comparatively young judge, I irreverently expressed doubts about its existence. I might have been Betsy Prig questioning the existence of Mrs. Harris. 'Have I know'd Mrs. Harris five-and-thirty year,' said Mrs. Gamp, 'to be told at last that there ain't no such person living?' Perhaps Betsy Prig was not the only unbeliever, certainly I was not, and now the daring statement of the Law Revision Committee that 'there is no such rule' has been adopted and authoritatively affirmed by Viscount Simon *ex cathedra* in the House of Lords. . . . How much has been swept away with the débris of the rule—what a mass of verbal refinements, of logic-chopping, of the results of pointless microscopical research!" : *Aspects of the Law* (Holdsworth Club, 1948), p. 22. See the same learned Law Lord in *Grant v. Sun Shipping Co.* [1948] A.C. 549, 563. The rule has been repudiated in New Zealand: *Helson v. McKenzies, Ltd.* [1950] N.Z.L.R. 878, but not in Prince Edward Island: *Weeks v. Cousins* (1964) 44 D.L.R. (2d) 816, or South Africa, *Pierce v. Hau Mon* [1944] A.D. 175.

⁷¹ *Davies v. Swan Motor Co.* [1949] 2 K.B. 291, 318, 321; *Jones v. Livox Quarries Ltd.* [1952] 2 Q.B. 608, 615. But see *Sproule v. Bogle* [1949] N.I. 134; *Khaier v. C. I. E.* (1957) 91 I.L.T.R. 112.

in the Commonwealth.⁷² On the contrary, some judges always realised that the principle in *Davies v. Mann* was not entirely equivalent to the last opportunity rule.⁷³

Conclusion

As the High Court of Australia has said ⁷⁴: "It is a sound 'rule,' only if it is framed in the terms in which it was originally framed by Salmond, and if it is recognised that it does not cover the whole ground. If it is expanded in a hopeless attempt to meet cases to which it is inappropriate, and subjected to innumerable refinements, it becomes not merely unsound but unintelligible." This erroneous conception disappeared at almost the same time as Parliament permitted the courts to apportion the loss in these cases. As we shall see, however, the principle in *Davies v. Mann* is still of importance today, although fortunately rid of the complexities and errors which once obscured it.

§ 94. Contributory Negligence: in Admiralty

Before the Law Reform (Contributory Negligence) Act, 1945, is discussed it may be helpful to indicate the rules of maritime law governing collisions at sea. For although by section 3 (1) of the Law Reform (Contributory Negligence) Act that Act does not apply to any claim to which section 1 of the Maritime Conventions Act, 1911, applies, the principles to be applied at common law are now the same as those applied in admiralty. The Maritime Conventions Act enabled the court to apportion the loss according to the degree to which each party was in fault,⁷⁵ but the court had first to decide whether the fault of either vessel had contributed to the loss or damage suffered. This problem was in general solved by applying the principles familiar to the courts of common law: "The legal doctrine of causation in admiralty law was not different from the rule at common law—it merely differed in respect of the consequences."⁷⁶

⁷² *Alford v. Magee* (1952) 85 C.L.R. 437, 457.

⁷³ *Davies v. Swan Motor Co. Ltd.* [1949] 2 K.B. 291, 318.

⁷⁴ *Alford v. Magee* (1952) 85 C.L.R. 437, at 460.

⁷⁵ s. 1: "Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault: Provided that if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally."

⁷⁶ *Davies v. Swan Motor Co.* [1949] 2 K.B. 291, at 310, per Bucknill L.J.

The principle in *The Volute*

The "rule of last opportunity," in the erroneous sense which has already been explained, was, however, never accepted in admiralty. There was no place for it. It had been invented by the courts of common law as an exception to their general rule that the contributory negligence of the plaintiff defeated his claim, but since the Court of Admiralty did not recognise that rule there was no need for the exception. There was never any rule in admiralty that the only cases of contributory negligence (in which the plaintiff at common law would recover nothing and in admiralty the damages would be divided in some proportion) were those in which the negligence of both parties was simultaneous or synchronous. So in admiralty damages could be apportioned even when it was possible to find a moment of time in the sequence of events under review when it could be said that one party had an opportunity of avoiding the accident which the other had not. It is, however, of vital importance to realise that in such a case apportionment was discretionary and not obligatory: the court could still throw the entire loss on one party even though the negligence of the other had contributed to the accident. All this was made plain in the memorable judgment of Viscount Birkenhead L.C. in *The Volute*,⁷⁷ which received the rare distinction of warm approval from the other members of the House.⁷⁸ Lord Birkenhead said:

"Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from

⁷⁷ [1922] 1 A.C. 129, at 144.

⁷⁸ "I regard the judgment to which we have just listened as a great and permanent contribution to our law on the subject of contributory negligence, and to the science of jurisprudence": Lord Finlay (with whom Lord Shaw concurred) at 145. But it has been said that the speech was really written by Lord Phillimore, and that Lord Finlay's effusive praise was in truth subtle denigration: Lord Wright, 18 M.L.R. 17; Goodhart, 7 J.S.P.T.L. 181. The speech (whatever its source) has been consistently cited with approval.

blame under the *Bywell Castle* rule,⁷⁹ might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution.”

In this case a collision had occurred in the North Atlantic between the *Radstock*, a destroyer, and the *Volute*, a merchant ship under convoy. The collision was due to the fault of the *Volute* in changing her course without giving the proper whistle-signal, and to the immediately subsequent fault of the *Radstock* in increasing her speed with knowledge of the danger caused by the *Volute's* change of course. Two contradictory arguments were advanced, but rebutted by Lord Birkenhead. For the *Volute* it was argued that apportionment was possible only when the faults of the two ships were simultaneous or synchronous and never when (as was alleged against the *Radstock*) one ship had an opportunity of avoiding the accident which the other had not. “If such should be the rule,” remarked Lord Birkenhead,⁸⁰ “it will be found that the cases of contributory negligence would be few.” Equally fallacious was the argument of the *Radstock* to the effect that whenever a collision was brought about by the faults of two vessels the loss must automatically be divided in some proportion, for it might be possible to find a clear dividing line so as to entitle the court to throw the entire loss on the party subsequently and severably negligent. A middle view was possible and desirable. It was held that both ships were to blame and that both were responsible, although the last opportunity of avoiding the collision was with the *Radstock*. There was not “a sufficient separation of time, place or circumstance between the negligent navigation of the *Radstock* and that of the *Volute* to make it right to treat the negligence on board the *Radstock* as the sole cause of the collision.” This case makes it quite clear that the doctrine enunciated in *Davies v. Mann* is not an inflexible rule of law applicable to every case in which the negligence of one party may be found to be subsequent to that of the other.

Drawing a clear line

Indeed, where, as in the case of most collisions at sea, two vessels are so moving in relation to each other that the safety of

⁷⁹ For this rule, see below, § 96.

⁸⁰ [1922] 1 A.C. 129, at 137.

each depends largely upon the care and skill of those in charge of the navigation of the other, it will be seldom that the mere fact that one is aware, or should have been aware, of a negligent course of conduct adopted by the other will compel the triers of fact to hold that the negligence of the latter has thereby become spent, stabilised, static or *functus culpa* (to mention a few of the epithets judicially used) so as to throw the entire loss on the former. For usually "the second act of negligence is so much mixed up with the state of things brought about by the first act" ⁸¹ that the collision will have been caused by the combined negligence of both parties. *The Volute* ⁸¹ and *The Boy Andrew* ⁸² are good examples of such cases.

Nor will the fact that the collision is between a moving vessel and a stationary object necessarily compel a clear line to be drawn so as to throw the entire loss on the party subsequently and severably negligent. This is shown by *The Eurymedon*.⁸³ In that case the *Corstar* was lying with effective anchor lights exhibited athwart the fairway of the Thames in an improper position. The *Eurymedon* on seeing the lights should have realised the possibility that they were those of a ship unexpectedly ahead and should have reduced speed immediately. The Court of Appeal held that the resulting collision was caused by the combined negligence of both ships and divided the damages. The negligence of each was wrapped up with and part of the negligence of the other.

§ 95. Contributory Negligence: the Act of 1945

The Law Reform (Contributory Negligence) Act, 1945, by section 1 (1), provides as follows: "Where any person suffers damage ⁸⁴ as the result partly of his own fault ⁸⁵ and partly of

⁸¹ [1922] 1 A.C. 129, 144.

⁸² [1948] A.C. 140. *Rickman v. Railway Executive* (1950) 83 Ll.L.R. 409 is a case in which it was possible to draw a clear line.

⁸³ [1938] P. 41. On the other hand, cases in which one vessel has recklessly and in defiance of the rules of common prudence encountered a dangerous state of affairs created by another and been held solely liable are common enough: e.g., *Anglo-Newfoundland Development Co. v. Pacific S.N. Co. Ltd.* [1924] A.C. 406.

⁸⁴ "Includes loss of life and personal injury": s. 4. See the interpretation given to the word in *Drinkwater v. Kimber* [1952] 2 Q.B. 281.

⁸⁵ "Means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence": s. 4. See *Cork v. Kirby McLean*

the fault of any other person or persons,⁸⁶ a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: . . .” It is probable that the provisions of the Act are not limited to those cases in which the defendant is charged with negligence, “as though the negligences belong to the same pack and one trumps the other.”⁸⁷ This would seem to follow from the definition of “fault” in section 4.⁸⁸ The rules on contributory negligence therefore apply to actions for breach of statutory duty,⁸⁹ nuisance,⁹⁰ conversion,⁹¹ and also to actions for breach of the duties owed by occupiers of dangerous premises,⁹² and even to a claim based on strict liability, such as the escape of fire.⁹³ Contributory negligence may also be a defence in an action of trespass to the person.⁹⁴

So the present position is that “the common law rule has been brought into line with that obtaining in admiralty and in each the problem should be approached broadly avoiding those fine distinctions which were apt to be drawn when some slight act of negligence on the part of the plaintiff might defeat his claim altogether.”⁹⁵ Although the Act was intended to do no more than alter the legal consequences of negligence by both parties causing or contributing to the damage complained of and does not affect the rules for determining whether negligence has been established,⁹⁶ the power to apportion the loss

Ltd. [1952] 2 T.L.R. 217. As the Act expressly contemplates that a plaintiff in breach of some statutory duty imposed upon him may yet recover part of his damages, the defence of *ex turpi causa non oritur actio* cannot be raised in such a case: *National Coal Board v. England* [1954] A.C. 408.

⁸⁶ By s. 1 (3), the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 is made applicable where two or more persons are liable.

⁸⁷ *Caswell v. Powell Duffryn Collieries Ltd.* [1940] A.C. 152, at 165, *per* Lord Atkin.

⁸⁸ See note 85 above.

⁸⁹ See note 85 above.

⁹⁰ As in *Butterfield v. Forrester* itself.

⁹¹ Above, § 39.

⁹² § 108.

⁹³ *McWhirter v. Emerson-Elliott (No. 2)* [1962] W.A.R. 162, 165.

⁹⁴ *Hollebone v. Barnard* [1954] 2 D.L.R. 278.

⁹⁵ *Boy Andrew (Owners) v. St. Rognvald (Owners)* [1948] A.C. 140, at 155, *per* Lord Porter.

⁹⁶ *Davies v. Swan Motor Co.* [1949] 2 K.B. 291, 310; *Stapley v. Gypsum Mines Ltd.* [1953] A.C. 663, 677. Although not admissible evidence, it is

equitably between the parties has led in practice to a broader approach.

§ 96. What Negligence is Contributory

Such then are the main causes of the confusion which has prevailed in the law of contributory negligence. With them present to our minds we will endeavour to state the governing principles of this defence, leaving aside for the moment any question arising out of *Davies v. Mann*. The present law may be summarised in the following propositions.

(1) Plaintiff need not owe any duty to defendant

The question of contributory negligence does not depend upon any breach of duty as between the plaintiff and the defendant.⁹⁷ This is a significant exception to the general principle that the question whether the plaintiff's conduct amounts to contributory negligence is to be decided according to the same principles as the question whether the defendant's conduct amounts to negligence. All that the defendant is obliged to prove is that the plaintiff failed to take reasonable precautions for his own safety in respect of the particular danger which in fact occurred, so that he thereby contributed to his own injury.⁹⁸ "This, however, is not to say that in all cases the plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully."⁹⁹ Such a duty will normally be owed in most cases of highway collisions. "Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle."¹

interesting to note that this was Lord Simon's own view. On June 14, 1945 he wrote to Winfield: "Of course the law as to what constitutes contributory negligence is not altered by my Bill at all; it is the effect of it upon the rights of the parties which is changed" (Simon papers).

⁹⁷ *Nance v. British Columbia Electric Ry. Co.* [1951] A.C. 601.

⁹⁸ *Nance v. British Columbia Electric Ry. Co.* [1951] A.C. 601; *Moor v. Nolan* (1960) 94 I.L.T.R. 153.

⁹⁹ [1951] A.C. at 611.

¹ *Ibid.*, at 611.

(2) Inoperative negligence to be distinguished from contributory negligence

It may be useful to observe that these difficult problems never arise unless it is proved, not merely that both parties were negligent, but that the negligence of each of them was a contributory cause of the accident.² The defendant may have been negligent but if the accident was caused exclusively by the negligence of the plaintiff, it is not a case of contributory negligence at all. The defendant succeeds not by setting off the operative negligence of the plaintiff against his own, but by disproving the operative quality of his own. The driver of a train may have negligently omitted to whistle, but this is not a ground of liability if the plaintiff was so deaf that he could not have heard the whistle in any case.

Scope of the risk

Conversely, the plaintiff may have been negligent, but unless that negligence was an operative cause of the accident none of the problems connected with contributory negligence arise. He may have been drunk, but if the defendant would have equally run him down had he been sober there is no question of contributory negligence.³ In such a case the negligence of the plaintiff did no more than account for his being in a place where the negligence of the defendant operated.⁴ The governing principle, as has already been said,⁵ is that the defendant must show that the plaintiff has failed to take reasonable care for his own safety in respect to the particular danger which has in fact occurred. The question whether this principle applies in any particular case is, as always, one of fact, but it may be helpful to indicate two classes of situations which, as a matter of law, fall outside the area of operation of the principle. First, "The law does not, in general, require of any man that he be careful of his own safety. I may indulge in rock-climbing and other dangerous pursuits if I like. What it does say is that a man who has negligently created a danger whereby another person is

² See Lord Simon in the *Boy Andrew Case* [1948] A.C. 140, 148—where each ship admitted she was to blame but maintained her negligence was not even a cause of the collision.

³ *Woods v. Davison* [1930] N.I. 161 (H.L.).

⁴ *Moor v. Nolan* (1960) 94 I.L.T.R. 153, 159.

⁵ See above, p. 385.

injured may plead as a way of avoiding liability that the injured person by his negligence contributed to create the danger.”⁶ Secondly, no question of operative contributory negligence arises in a case where the defendant proves only that the plaintiff has failed to take precautions against a foreseeable danger which has not occurred and that those precautions, if taken, would have been effective to protect him against the unforeseeable danger which in fact occurred.⁷ A motorist who drives straight across a light-controlled crossing against the red light and knocks down a pedestrian who has begun to cross in reliance on the lights but without looking over his right shoulder cannot be heard to say that the pedestrian is thereby guilty of contributory negligence as against him, though such conduct on the part of the pedestrian might attract that description if he had been knocked down by a motorist lawfully turning left with the green light in his favour.⁸

An example of an English case in which the conduct of the plaintiff was held to be negligent in relation to the particular risk to which his conduct had exposed him is *Jones v. Livox Quarries Ltd.*⁹ In this case the plaintiff, who was employed at the defendants’ quarry, was injured when a fellow-servant negligently driving a dumper ran into the back of a traxcavator on which the plaintiff was (contrary to express orders) standing. The Court of Appeal rejected the argument that the plaintiff, by being where he was, ran the risk of being thrown off the traxcavator, but not the risk of being crushed between it and another vehicle, and held him one-fifth responsible for the accident.¹⁰

The statement that the plaintiff must be shown to have failed to take proper precautions for his own safety against the particular danger which in fact occurred “does not mean that the particular form in which the danger manifested itself should actually have occurred to his mind. It is sufficient if it is a danger of a particular class whose occurrence he should anticipate

⁶ *Moor v. Nolan* (1960) 94 I.L.T.R. 153, at 160, per Kingsmill Moore J.

⁷ *Moor v. Nolan* (1960) 94 I.L.T.R. 153.

⁸ *Eva (Joseph) Ltd. v. Reeves* [1938] 2 Q.B. 393; *Moor v. Nolan* (1960) 94 I.L.T.R. 153.

⁹ [1952] 2 Q.B. 608.

¹⁰ “I may say that if the plaintiff, whilst he was riding on the towbar, had been hit in the eye by a shot from a negligent sportsman, I should have thought that the plaintiff’s negligence would in no way have been a cause of his injury”: *ibid.* at 616, per Denning L.J.

and take reasonable precautions to guard against. Persons crossing a street must anticipate that the street may be used by any form of traffic which is legitimately entitled to be traversing it and danger from such traffic, whatever its nature, is to be guarded against. No doubt a pedestrian ordinarily thinks in terms of motor-cars, horse traffic, and other pedestrians. But if he were to run under the legs of an elephant belonging to a travelling circus which was being taken along the road he could not justify his failure to look out on the ground that a pedestrian is not expected to think in terms of elephants. An elephant is in the class of legitimate road users. On the other hand, he would not be expected to look out for a helicopter making a forced descent.”¹¹

(3) The plaintiff's right to rely on the care of others

In many cases the plaintiff is entitled to assume that there is no danger. He is not bound to anticipate and provide for the possible negligence of the defendant but is entitled to take it for granted that the defendant has done all things rightly and carefully. If an accident happens in such a case, the defendant will not be heard to say that the plaintiff might have avoided it by care, because no such care was obligatory on him.¹² Again there is in general no duty to anticipate that another will be negligent, and to avoid the effects of that negligence by anticipation.¹³ So the Judicial Committee has said that “traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets.”¹⁴ Yet it has also been said that there are some cases where a prudent man will guard against the possible negligence of others when experience shows such negligence to be common.¹⁵ Experience shows this to be particularly common on the highway. “A driver is not, of course, bound to anticipate folly in all its forms, but he is not,

¹¹ *Moor v. Nolan* (1960) 94 I.L.T.R. 153, at 160–161, *per* Kingsmill Moore J.

¹² *Grant v. Sun Shipping Co.* [1948] A.C. 549, 567.

¹³ *Compania Mexicana v. Essex Transport Co.* (1929) 141 L.T. 106, 115.

¹⁴ *Toronto Railway Co. v. King* [1908] A.C. 260, at 269, *per* Lord Atkinson.

¹⁵ *Grant v. Sun Shipping Co.* [1948] A.C. 549, 567.

in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take.”¹⁶

(4) The doctrine of alternative danger: the “dilemma principle”

Where the plaintiff is perplexed or agitated by being exposed to danger by the wrongful act of the defendant, it is sufficient if he shows as much judgment and self-control in attempting to avoid that danger as may reasonably be expected of him in the circumstances. For the reasonable man is cool and collected and remembers to take precautions for his own safety even in an emergency.¹⁷ What is done or omitted to be done in “the agony of the moment” cannot fairly be treated as negligence,¹⁸ unless the plaintiff’s trade or calling is such that a certain degree of aptitude for dealing with dangerous situations may be expected of him.¹⁹ On the other hand, the courts do not demand of the plaintiff the care of a superman²⁰ but only that of a man of ordinary nerve and presence of mind. So in *Jones v. Boyce*,²¹ in a coach accident, the plaintiff was placed by the negligence of the defendant in a perilous alternative—to jump or not to jump. He jumped and was injured. Had he kept his seat he would have escaped. But he was able to recover from the defendant, for he had acted reasonably and not from a rash apprehension of danger. So a lady locked in a public lavatory is entitled to make reasonable efforts to escape from her predicament.²² The same rule is applied in cases of collisions at sea and is known as the rule in *The Bywell Castle*.²³ On the other hand,

¹⁶ *J.P.T.B. v. Upson* [1949] A.C. 155, at 173, *per* Lord Uthwatt. See, too, the *Boy Andrew Case* [1948] A.C. 140, 153. But a motorist who enters a cross-roads when the traffic lights are in his favour is not bound to assume that another may attempt to cross illegally against them: *Eva (Joseph), Ltd. v. Reeves* [1938] 2 K.B. 393; *Moor v. Nolan* (1960) 94 I.L.T.R. 153. But it seems that he is bound to foresee that another may come out of a minor into a major road without obeying a “Slow” sign: *Lang v. London Transport Executive* [1959] 1 W.L.R. 1168.

¹⁷ *Ghannan v. Glasgow Corporation*, 1950 S.C. 23, 28 (“It will not do to equate the reasonable man to the young man in a hurry”—*per* Lord Cooper).

¹⁸ *Jones v. G. W. Ry.* (1930) 144 L.T. 194, 201.

¹⁹ *Brown v. Hunt*, 1953 (2) S.A. 540.

²⁰ *U.S. Shipping Board v. Laird Line Ltd.* [1924] A.C. 286, 292.

²¹ (1816) 1 Starkie 493.

²² *Sayers v. Harlow U.D.C.* [1958] 1 W.L.R. 623.

²³ (1879) 4 P.D. 219. (The case arising out of the disaster off Woolwich in which the excursion steamer *Princess Alice* was cut in two by the *Bywell Castle*.)

it must be remembered that such an emergency does not last for ever. "After an interval, be it short or long according to the circumstances, it subsides, the effects of the plaintiff's negligence are exhausted, and things are then normal for the defendants."²⁴

So also a plaintiff is not necessarily guilty of contributory negligence simply because he has knowledge of a danger which the defendant has wrongfully created, but chooses to run the risk rather than to forgo the exercise of his liberty of action.²⁵ Similarly if the plaintiff is invited or ordered by the defendant to run the risk in question he cannot be held guilty of contributory negligence in doing so.²⁶ This doctrine has been further extended to cover the case of a plaintiff acting under the compulsion of a legal or moral duty.²⁷ This doctrine of alternative danger applies not only where one of the parties to an action has been negligent (and it should be remembered that it may apply in favour of the defendant as well as of the plaintiff),²⁸ but also when the emergency has been created by the negligence of a third party or by an act of God.²⁹ It also extends to cases where the property (as distinct from the person) of the plaintiff or another has been endangered.³⁰

It may well be that since the courts have been given power to apportion the loss the doctrine of alternative danger (like the test of last opportunity) has lost its place in the law.³¹ The question now is whether the party acted reasonably in all the circumstances of the case.

(5) Contributory negligence of children

The governing principles here are clearly set out in the following passage:

"In the case of a child of tender years there must be some age up to which the child cannot be guilty of contri-

²⁴ *Rickman v. Railway Executive* (1950) 83 Ll.L.R. 409, at 411, *per* Asquith L.J.

²⁵ *Billings (A. C.) & Sons Ltd. v. Riden* [1958] A.C. 240. See above, § 13.

²⁶ *Yarmouth v. France* (1889) 19 Q.B.D. 647.

²⁷ *Haynes v. Harwood* [1935] 1 K.B. 146. Above, § 14.

²⁸ *Swadling v. Cooper* [1931] A.C. 1, 9; *McLean v. Bell* (1932) 147 L.T. 262, 263.

²⁹ *Brown v. Hunt*, 1953 (2) S.A. 540.

³⁰ *Wilson v. United Counties Bank* [1920] A.C. 102, 125; *Sutherland v. Glasgow Corporation*, 1951 S.C. 1. *Contra*, Lord Sumner in *Singleton Abbey (Owners) v. Paludina (Owners)* [1927] A.C. 16, 28.

³¹ *Williams*, s. 91.

butory negligence. In other words, there is some age up to which a child cannot be expected to take any precautions for his own safety. In cases where contributory negligence is alleged against a child, it is the duty of the trial judge to rule, in each particular case, whether the plaintiff, having regard to his age and mental development, may properly be expected to take some precautions for his own safety and consequently be capable of being guilty of contributory negligence. Having ruled in the affirmative, it becomes a question of fact for the jury, on the evidence, to determine whether he has fallen short of the standard which might reasonably be expected from him having regard to his age and development. In the case of an ordinary adult person the standard is what should be expected from a reasonable person. In the case of a child, the standard is what may reasonably be expected, having regard to the age and mental development of the child and the other circumstances of the case."³²

In *Yachuk v. Oliver Blais Co.*,³³ where a boy of nine obtained petrol from the defendants by untruthfully stating the purpose for which he wanted it,³⁴ and burnt himself severely with it, it was held that a reduction of his damages could not be made on the ground of contributory negligence,³⁵ for there was no evidence that he was aware of the peculiarly dangerous quality of petrol, and it was impossible to regard him as being any more capable of taking care of himself in those circumstances than a normal boy at that age.³⁶

(6) Contributory negligence a question of fact

It is a question of fact in each case whether the conduct of the plaintiff amounts to contributory negligence. Subject to what has been said about the special cases of alternative danger and the right to rely on the care of others, in general the quality

³² *Fleming v. Kerry County Council* [1959] Ir.Jur.Rep. 71, at 72, per O'Byrne J.

³³ [1949] A.C. 386. Most of the law on this topic goes back to *Lynch v. Nurdin* (1841) 1 Q.B. 80, which is considered below, § 113.

³⁴ The untruth was no defence, for it was found that the story told was such as to arouse rather than allay suspicion in the mind of a reasonable man.

³⁵ Though the trial judge had thought the plaintiff "75 per cent. responsible."

³⁶ These cases are sometimes dealt with as raising problems of the existence of any duty of care or of remoteness of damage: see above, §§ 12, 13.

of the plaintiff's conduct is judged by the same standard as that of the defendant. There is no rule of law that certain conduct is or is not equivalent to contributory negligence. Thus it was once thought that there was a rule of law that a person driving in the dark must be able to pull up within the limits of his vision, so that if he failed to do so he must be guilty of contributory negligence. This has, however, been emphatically denied in the Court of Appeal: each case depends on its own facts.³⁷

Except perhaps in factory cases

To this salutary principle there may, as the law now stands, be one exception. It has been laid down in a series of cases arising out of claims made under the Factories Act, 1937, that it is not every error of judgment or heedlessness or inadvertence which amounts to contributory negligence.³⁸ But these cases may well be open to review in the House of Lords on the ground that the power which the courts now have to apportion the loss according to the respective degrees of fault of the parties justifies a different approach. Further, it has been made clear that the general rule and not the exception applies to claims for breach of an employer's duties at common law.³⁹ The principle in *Caswell's case*³⁸ "cannot be used so as to require any modification in the standard of care required from a workman in relation to his fellow servants or other third parties or the resulting liability of his employers."⁴⁰

(7) Contributory negligence of plaintiff's servants and agents⁴¹

The contributory negligence of a servant of the plaintiff is a good defence, in the same cases and to the same extent as that of the plaintiff himself, whenever the plaintiff would have been responsible for that negligence of his servant had harm ensued from it. In other words, the rule that the negligence of a servant in the course of his employment is imputed to his master

³⁷ *Morris v. Luton Corporation* [1946] K.B. 114; *Harvey v. Road Haulage Executive* [1952] 1 K.B. 120.

³⁸ *Caswell v. Powell Duffryn Associated Collieries Ltd.* [1940] A.C. 152.

³⁹ *Staveley Iron & Chemical Co. Ltd. v. Jones* [1956] A.C. 627.

⁴⁰ [1956] A.C. at 648, *per Lord Tucker*. See *Hicks v. British Transport Commission* [1958] 1 W.L.R. 493, 507.

⁴¹ On this topic consult MacIntyre, "The Rationale of Imputed Negligence" (1944) 5 Univ. of Toronto L.J. 368; Williams, *Contributory Negligence*, s. 115.

is applicable when the master is a plaintiff no less than when he is a defendant.⁴² It should be remembered that one spouse may be the servant or agent of the other. Hence if a husband is a passenger in a motor-car which is being driven by his wife as his servant or agent, and a collision occurs as a result of the combined negligence of the wife and a third party in which the husband is injured, the damages which may be awarded to him for his personal injuries may be reduced by the amount to which she is in fault.⁴³ Presumably the same principle applies to other forms of vicarious liability.⁴⁴

Exploded doctrine of identification

The contributory negligence of an independent contractor or other agent of the plaintiff for whom he is not responsible, on the other hand, is no bar to the plaintiff's action. If a taxi-cab hired by the plaintiff comes into collision with another vehicle by the negligence of both drivers, and the plaintiff is hurt, he can recover damages not only from his own driver but also from the other.⁴⁵ It was for some time, indeed, believed that this was not so, and that the negligence of the driver of a vehicle was imputed to the passenger with the result that the passenger lost his remedy against third persons. This unreasonable doctrine, sometimes known as "the doctrine of identification," was overruled by the House of Lords in *Mills v. Armstrong, The Bernina*.⁴⁶

Children in the charge of adults

It was once thought that a child in the charge of an adult was so far "identified" with that adult as to disentitle it from

⁴² It is true that the Contributory Negligence Act, 1945, does not expressly provide for this situation, but it cannot have been intended to alter the well-settled law on this point. In *Mallett v. Dunn* [1949] 2 K.B. 180, it was assumed that the Act applied in a case of imputed negligence.

⁴³ *Berrill v. Road Haulage Executive* [1952] 2 Lloyd's Rep. 490; *Lampert v. Eastern National Omnibus Co.* [1954] 1 W.L.R. 1047; *Rome v. Manawatu County* [1955] N.Z.L.R. 165. *Aliter* with his claim for loss of services, which is a distinct cause of action: *Mallett v. Dunn* [1949] 2 K.B. 180; Davis, "Contributory Negligence: the Second Plaintiff" (1950) 13 M.L.R. 213.

⁴⁴ *The Bernina* (1888) 13 App.Cas. 1, 16.

⁴⁵ *France v. Parkinson* [1954] 1 W.L.R. 581.

⁴⁶ (1888) 13 App.Cas. 1. Nor is the bailor of a chattel precluded by the contributory negligence of his bailee from recovering damages from a third person by whose negligence the chattel has been injured or destroyed: *Wellwood v. King (Alexander), Ltd.* [1921] 2 I.R. 274; *Krahn v. Bell* [1930] 4 D.L.R. 480.

suing for personal injuries caused by the negligence of the adult and a third party.⁴⁷ In *Oliver v. Birmingham and Midland Omnibus Co.*,⁴⁸ in which the plaintiff, aged four years, was injured due to the combined negligence of his grandfather (in whose care he was) and the defendants, it was held that since *The Bernina* this doctrine was no longer law. The fact that the child is in the charge of an adult may, however, in certain cases exempt the defendant from a duty which would otherwise exist of care towards the child—the defendant being entitled to assume that the child will be duly protected by its adult guardian, and therefore is not in danger.⁴⁹

(8) Burden of proof

The burden of proving the negligence of the plaintiff and that it contributed to the damage in such a way as to exonerate the defendant wholly or partially lies upon the defendant.⁵⁰ The defendant must always establish such contributory negligence as will amount to a defence: it is not true that the onus of establishing that the defendant failed to take advantage of a last opportunity rests upon the plaintiff.⁵¹

§ 97. Principle in *Davies v. Mann* Today

It has already been seen that “the rule of last opportunity,” in the sense of an inflexible rule of law applicable over the whole field of contributory negligence, had become obsolete even before the Act of 1945.⁵² This does not mean that the plain and sensible principle expounded in *Davies v. Mann* and *Radley’s* case has also become obsolete. Just as there is room for it in admiralty after the Act of 1911 so there is room for it at common law after the Act of 1945. For, as Lord Birkenhead went to such pains to emphasise in *The Volute*, the mere fact that a collision has occurred in consequence of the blameworthy conduct of two

⁴⁷ *Waite v. North Eastern Ry.* (1858) E.B. & E. 719. See the full discussion of the case in Anon., *Contributory Negligence and Third Parties*, pp. 52–68 (Tasmania, 1936).

⁴⁸ [1933] 1 K.B. 35. The principle of this decision applies to other persons incapable of looking after themselves—e.g., the very old: [1938] 1 K.B. at 41.

⁴⁹ See below, § 113, for an example.

⁵⁰ *Heranger S.S. Co. v. Diam v. S.S. Co.* [1939] A.C. 74, 104.

⁵¹ *Aiford v. Magee* (1952) 85 C.L.R. 487, 468.

⁵² Above, § 93.

vessels does not necessarily imply that the loss must automatically be distributed between the parties in some proportion. It might be possible to find "a sufficient separation of time, place or circumstance" to enable "a clear line to be drawn" between the faults of the two parties. The same principle now applies at common law. "One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident."⁵³ Hence it is still the law that sole liability may be imputed to one party even though the misdoings of both are relevant to the cause of the accident. Whether or not the dividing line "emerges with clarity or is so blurred as to be barely distinguishable from the surrounding mass is a question of fact in each case for the tribunal charged with the duty of determining such questions."⁵⁴ It will be convenient to examine the application of this principle to different situations of fact.

(1) Collisions between two moving objects

It has already been seen that in admiralty it is seldom possible to draw "a clear line" in cases of this kind.⁵⁵ The position is similar in the case of collisions on land between two modern fast-moving vehicles.⁵⁶ So in *France v. Parkinson*,⁵⁷ in which two motor-cars proceeding along cross-roads of equal status had come into collision at the centre of the crossing, it was said that there was a *prima facie* case of negligence against both drivers.

⁵³ *Stapley v. Gypsum Mines Ltd.* [1953] A.C. 663, at 681, *per* Lord Reid. Lords Porter (at 677) and Asquith of Bishopstone (at 687-688), though dissenting as to the application of the principle to the facts, expressed themselves in similar terms.

⁵⁴ *Marvin Sigurdson's Case* [1953] A.C. 291, at 304.

⁵⁵ Above, § 94.

⁵⁶ *Alford v. Magee* (1952) 85 C.L.R. 437, 465.

⁵⁷ [1954] 1 W.L.R. 581. Contrast the difficulties which arose on similar facts in *Swadling v. Cooper* [1931] A.C. 1 (above, § 98).

of case tests which have been used in traffic accidents by land or sea.”⁶⁵

Loach's case today

There has been some doubt whether the doctrine in *Loach's* case⁶⁶ has survived the Act. There has naturally been reluctance to believe that so complex a doctrine as that of “constructive last opportunity” has any place in the present law. So it has been argued that if one party, by reason of his own negligence, does not actually know of the dangerous state of affairs created by the negligence of the other, or has by his own negligence or deliberate act disabled himself from becoming aware of it, he should not have the entire loss thrown upon him (as he would if *Loach's* case were still law) but should be held liable only for a proportion of the resulting damage. But in *Marvin Sigurdson v. British Columbia Electric Ry.*⁶⁷ the Judicial Committee pointed out that if this were adopted as a general rule it would mean that a driver who was carelessly failing to keep a good look-out would escape more lightly than one who saw the danger but nevertheless decided to incur the risk, for usually the entire loss would be thrown on the latter. The Judicial Committee disapproved⁶⁸ attempts to classify acts in relation to one another with reference to time, or with regard to the knowledge of one party at a particular moment of the negligence of the other, and by such tests to create categories in some of which one party was solely liable and others in which both parties were liable.⁶⁹ It is a question of fact in each case.

§ 98. Practice and Procedure

(1) Form of direction to the jury

“It is not the whole law of negligence that needs exposition in every case, but only that part of it which is essential to a

⁶⁵ [1953] A.C. at 681, *per* Lord Reid.

⁶⁶ Above, p. 827. It was referred to without disapproval by Lord Simon and Lord Porter in *The Boy Andrew* [1948] A.C. 140, 150, 152 and in *Prince Edward Island* has been held still to be law: *Weeks v. Cousins* (1964) 44 D.L.R. (2d) 816.

⁶⁷ [1953] A.C. 291. It is strange that this company should have been the unsuccessful party to an appeal to the Judicial Committee in three of the leading cases on contributory negligence.

⁶⁸ [1953] A.C. 291, 812.

⁶⁹ See *Monteith*, 65 L.Q.R. 818.

clear understanding of the issue which the jury has to determine.”⁷⁰ It has also been repeatedly emphasised in the reports that it is important to avoid “legal subtleties and philosophical disquisitions on the theory of causation which, however fascinating, only tended to perplex and confuse the average jurymen.”⁷¹ Yet the jury are entitled to look to the judge for some guidance: it will not do to leave the whole matter to their unregulated benevolence. Hence the law should be given to the jury, not merely with reference to the facts of the particular case but also with an explanation of how it applies to those facts.⁷² We have already seen that in some cases—e.g., highway collisions between two fast-moving vehicles—it would be quite inappropriate to consider the principle in *Davies v. Mann*.⁷³ In such a case it may only be necessary to consider whether the conduct of one or other of the parties (e.g., the acts of a party in a state of excusable alarm) has the legal quality of negligence.⁷⁴ In other cases it may be appropriate to direct the jury according to the principle in *Davies v. Mann*. In such cases there must, as we have seen, be some fair and reasonable ground for distinguishing between the negligence of the two parties. The distinction should not be drawn on light, trivial or dubious grounds: and in particular it should be remembered that estimates of times, speeds and distances in relation to acts which occurred within a few seconds may be of doubtful value.⁷⁵ If such a direction should be appropriate the best guide to a jury will probably be the language of Lord Birkenhead in *The Volute*. But the omission to use this language will not constitute a misdirection if the summing-up is in all other respects full, accurate and careful.⁷⁶

(2) Mode of apportionment

When a court has decided, according to the principles already discussed, that the case is one in which it is proper to apportion

⁷⁰ *Swadling v. Cooper* [1931] A.C. 1, 10.

⁷¹ *Sigurdson v. British Columbia Electric Ry.* [1953] A.C. 291, 299.

⁷² *Fitzgerald v. Penn* (1954) 91 C.L.R. 268.

⁷³ Above, § 97.

⁷⁴ *Fitzgerald v. Penn* (1954) 91 C.L.R. 268, 276.

⁷⁵ *Sigurdson v. British Columbia Electric Ry.* [1953] A.C. 291; *Khater v. C. I. E.* (1957) 91 I.L.T.R. 112.

⁷⁶ *Sigurdson's Case* [1953] A.C. 291, 303.

(ii) *Private interest protected only by special remedy*

The legislature, even while recognising a private right vested in the injured individual, may intend that it shall be maintained solely by some special remedy provided for the particular case, and not by the ordinary method of an action for damages. Thus, in *Atkinson v. Newcastle & Gateshead Waterworks Co.*¹² it was held by the Court of Appeal that the defendant company was not liable in damages for the destruction of the plaintiff's house by fire, although its destruction was directly due to the failure of the defendants to perform the duty laid upon them under the Waterworks Clauses Act, 1847,¹³ to maintain a certain pressure of water in their water-pipes for the purpose of extinguishing fires. The statute in question provided that any breach of this duty should be an offence punishable by a fine of £10, and the court came to the conclusion that on the true interpretation of the statute this was the sole remedy available, and that there was no intention of imposing on the waterworks company any such heavy civil liability as the opposite interpretation would have subjected them to.

Special statutory remedy

So where a special remedy is expressly provided, *prima facie* this was intended to be the only one and to exclude by implication any resort to the common law. But this is by no means conclusive. The weight to be attributed to this consideration will depend largely on whether the statutory remedy does or does not involve compensation to individual persons injured. Thus a pecuniary penalty payable wholly to the Crown has comparatively little significance in excluding an action for damages. So in *Monk v. Warbey*¹⁴ the defendant lent his car to one Knowles who, owing to the negligence of his driver, injured the plaintiff. The defendant had insured himself against third-party risks, but had not provided for parting with control of the car to uninsured friends, and therefore had exposed himself to a penalty under

¹² (1877) 2 Ex.D. 441.

¹³ s. 42. But a breach of the duty under s. 35 of the same Act to provide a supply of pure and wholesome water gives a right of action for damages to a ratepayer injuriously affected: *Read v. Croydon Corporation* [1938] 4 All E.R. 681. See now the Water Act, 1945, s. 28; and for provisions corresponding to s. 42 of the 1847 Act see Sched. 3, Part VIII of the 1945 Act.

¹⁴ [1935] 1 K.B. 75.

section 35 of the Road Traffic Act, 1930.¹⁵ It was held that he was liable in damages to the plaintiff for the breach of his statutory duty. Otherwise the express object of the Act, namely, to give a remedy to third persons who might suffer injury by the negligence of the impecunious driver of a car, would have been defeated. The decision in *Monk v. Warbey* is a striking one. It is almost the sole exception to the general bias of the courts against the construction of penal statutes to create torts. Thus, although it is a criminal offence¹⁶ to sell a motor-vehicle for delivery in such condition that its use on the road in that condition would be unlawful, the vendor of such a vehicle is not liable in damages for breach of statutory duty to one who has been injured as a result of the car's condition.¹⁷ So, too, one who is injured as a result of the defendant's failure to comply with the statutory duties¹⁸ relating to the construction of vehicles¹⁹ has no right of action merely by reason of that fact: the law regards him as adequately protected by the action of negligence.²⁰ But if the penalty goes or may go in whole or in part to the injured persons, much greater weight may rightly be attached to its existence. Again, where a civil remedy is provided in certain cases by the Act itself²¹ or other legislation²² or by the common law,²³ *prima facie* no action will lie in other cases than those for which provision is made.

Need for reform

It will now be apparent how difficult it is to lay down any definite principle. The general rule is that "Where an act

¹⁵ Now s. 201 of the Road Traffic Act, 1960. But there is no statutory duty to insure against the third-party liability of passengers in, but not controlling the use of, the car: *Brown v. Roberts* [1965] 1 Q.B. 1.

¹⁶ Road Traffic Act, 1960, s. 68 (1).

¹⁷ *Badham v. Lambs Ltd.* [1946] K.B. 45.

¹⁸ Now the Motor Vehicles (Construction and Use) Regulations, 1963 (S.I. 1963, No. 1646).

¹⁹ *Phillips v. Britannia Hygienic Laundry Co.* [1929] 2 K.B. 832.

²⁰ So no action lay in *Clarke v. Brims* [1947] K.B. 497 (failure to carry red rear light), or *Balmer v. Hayes*, 1950 S.C. 477 (failure of driver to disclose epilepsy when applying for licence). Nor is an employer under any duty to his servant to insure against third-party risks a vehicle driven by the servant: *Semtex, Ltd. v. Gladstone* [1954] 1 W.L.R. 945.

²¹ *Chadwick v. Pioneer Private Telephone Co.* [1941] 1 All E.R. 522.

²² *Square v. Model Farm Dairies* [1939] 2 K.B. 365.

²³ *Phillips v. Britannia Hygienic Laundry Co.* [1929] 2 K.B. 832, 842. So understood, this case can be reconciled with *Monk v. Warbey*, in which it was cited with approval. It is difficult to discover any other principle by which to distinguish the two cases.

creates an obligation and enforces the performance in a specified manner . . . performance cannot be enforced in any other manner.”²⁴ But the law depends on the interpretation which the courts (with or without the aid of the principles of construction which are now falling into some disfavour) may place on any particular statute. “To a person unversed in the science, or art, of legislation it may well seem strange that Parliament has not by now made it a rule to state explicitly what its intention is in a matter which is often of no little importance instead of leaving it to the courts to discover, by a careful examination and analysis of what is expressly said, what that intention may be supposed probably to be.”²⁵ But Parliament has begun to attend to this complaint, and some statutes now state explicitly that a breach of duty is actionable.²⁶

(iii) *Damage suffered not kind to be guarded against*

An action for damages will not lie at the suit of an injured person if the damage suffered by him is not of the kind intended to be guarded against. In *Gorris v. Scott*²⁷ the plaintiff sued the defendant, a shipowner, for the loss of sheep which had been swept overboard in consequence of the failure of the defendant to supply certain pens and other structures on the deck of his ship for the accommodation of sheep, as required by Act of Parliament. It was held, however, that the defendant was not liable, because the purpose of the statute in question was to make provision against the spread of contagious disease among animals, and not to prevent such accidents as the plaintiff complained of.²⁸ The principle in *Gorris v. Scott*²⁷ was approved by the House of Lords in *Grant v. National Coal Board*,²⁹ although a different conclusion was arrived at on the interpretation of the relevant statute. Some redd or stone fell from the roof of a travelling road in the

²⁴ *Doe v. Bridges* (1831) 1 B. & Ald. 847, at 859, per Lord Tenterden C.J.

²⁵ *Cutler v. Wandsworth Stadium Ltd.* [1949] A.C. 398, at 410, per Lord du Parcq. It should be noted that the neighbour principle expounded in *Donoghue v. Stevenson* [1932] A.C. 562 (see above, § 81) has not affected the established rules on this matter: *Commerford v. Board of School Commissioners of Halifax* [1950] 2 D.L.R. 207.

²⁶ See the Consumer Protection Act, 1961, s. 2, and the Resale Prices Act, 1964, s. 4 (2).

²⁷ (1874) L.R. 9 Ex. 125.

²⁸ The preceding three sentences were cited with approval by Devlin L.J. in *Sparrow v. Fairey Aviation Co., Ltd.* [1962] 1 Q.B. 161, 174.

²⁹ [1956] A.C. 649. See also above, § 84.

respondents' mine and caused the derailment of a bogie on which the appellant was travelling. The respondents were held liable for a breach of section 49 of the Coal Mines Act, 1911, which provided that "The roof and sides of every travelling road . . . shall be made secure."³⁰ The object of the enactment was to promote safety and the protection it afforded was not limited to injuries caused in a particular way (i.e. by a direct fall from the roof).

Finally it should be noted that even when the breach of the statute does not in itself give a right of action to an individual damnified thereby the right of action for breach of any common law duty to conduct oneself with reasonable care so as not to injure those persons likely to be affected by want of care is not excluded.³¹ The statutory duty does not extinguish the common law duty unless there is an express provision or necessary implication to that effect.³²

§ 100. Absolute Statutory Duties

When a duty is created by statute, the breach of which is an actionable tort, it is a question of construction whether the liability is absolute, or depends on wrongful intent or negligence on the part of the defendant. In other words, when a statute provides that a certain thing must be done, it is a question of interpretation whether this means that the thing is to be done in all events, or merely that the person upon whom the duty is imposed is to use due care and diligence in the endeavour to perform it, and that if he fails to perform it through no fault of his he shall be free from liability.³³ So, on the one hand, in *Hammond v. Vestry of St. Pancras*³⁴ the defendants were held not liable in the absence of proof of negligence for failure to perform their statutory duty of keeping the sewers in order. On the other hand, in *Groves v. Wimborne*³⁵ it was held that liability for a breach of the statutory duty to fence dangerous machinery was absolute, and independent of any proof of negligence on the part of the defendant or

³⁰ Now s. 48 of the Mines and Quarries Act, 1954.

³¹ *East Suffolk Catchment Board v. Kent* [1941] A.C. 74, 89.

³² *Read v. Croydon Corporation* [1938] 4 All E.R. 687, 654.

³³ The preceding two sentences were cited with approval by Luxmoore L.J. in *Greenwood v. Central Services Co.* [1940] 2 K.B. 447, 461.

³⁴ (1874) L.R. 9 C.P. 316.

³⁵ [1898] 2 Q.B. 402.

his servants. *Groves v. Wimborne* is more typical of the modern approach than *Hammond v. Vestry of St. Pancras*. The reports contain many cases where actions have been brought for breach of the absolute duty to fence dangerous machinery imposed by the Factories Act, 1961.³⁶ It may be wrong to describe the nature of the duty in these cases as "absolute," for that is a term which signifies a duty which exists independently of fault, and in these cases there has often been an intentional or negligent failure to comply with the statutory duty.³⁷

Statutory negligence

It seems that the decision of the House of Lords in *Lochgelly Iron and Coal Co. v. M'Mullan*³⁸ has settled that an action for breach of a statutory duty which involves the notion of taking care not to injure³⁹ is for the purposes of an action for damages equivalent to negligence. "Whereas at the ordinary law the standard of duty must be fixed by the verdict of a jury, the statutory duty is conclusively fixed by the statute."⁴⁰ Lord Wright said⁴¹ that the breach of such a duty had been "correctly described as statutory negligence." But he appears subsequently to have modified his views, for in *London Passenger Transport Board v. Upson*⁴² he said: "A claim for damages for breach of a statutory duty intended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty. It is an

³⁶ See below. §§ 101-102, in which the defences to an action for breach of statutory duty are also considered.

³⁷ *Williams*, 28 M.L.R. 233, 238.

³⁸ [1934] A.C. 1.

³⁹ In some cases (e.g., *Monk v. Warbey* [1935] 1 K.B. 75) the statutory duty in issue has nothing to do with negligence.

⁴⁰ [1934] A.C. 23, *per* Lord Wright. So the statutory precautions must be carried out, even though some other precaution might be equally effective: *Stein & Co. Ltd. v. O'Hanlon* [1965] 2 W.L.R. 496.

⁴¹ [1934] A.C. at 23.

⁴² [1949] A.C. 155, at 168. *Cf. Hamilton (William) & Co. v. Anderson & Co.*, 1953 S.C. 129.

effective sanction. It is not a claim in negligence in the strict or ordinary sense; as I said in *Caswell's* case,⁴³ 'I do not think that an action for breach of a statutory duty such as that in question is completely or accurately described as an action in negligence. It . . . belongs to the category often described as that of cases of strict or absolute liability.' There are obvious differences between the two claims: in one the standard of care is fixed by the legislature, in the other by the court⁴⁴; in one the defence of *volenti non fit injuria* is applicable, in the other it is not.⁴⁵ In any event negligence and breach of statutory duty are usually treated as two separate causes of action from a pleading point of view.⁴⁶ Further, a breach of statutory duty does not automatically throw on the defendant the onus of proving he was not in breach of his common law duty.⁴⁷ Still, even if breach of statutory duty is not the tort of negligence, that is no reason why it should not be some other tort.⁴⁸ But although the causes of action are separate there is really only one head of damage for which redress is sought, so that satisfaction of one cause of action ends the whole claim.⁴⁹

§ 101. Statutory Duties in Factories, Mines, and Shops

Factories

Although this work is concerned mainly with the common law duties of a master to his servants, some indication must be given of the nature of the statutory duties which have been created for the protection of workmen, for claims for damages incurred through the breach of these duties are commonly joined with a claim for negligence at common law.⁵⁰ It has been settled for many years that a civil action for damages can be brought

⁴³ [1940] A.C. 152, 177-178.

⁴⁴ See above, §§ 86-88.

⁴⁵ See below, § 103.

⁴⁶ *Murfin v. United Steel Companies, Ltd.* [1957] 1 W.L.R. 104; *Smith v. Wilkins and Davies Construction Co., Ltd.* [1958] N.Z.L.R. 956.

⁴⁷ *Davis v. Everard (F. T.) & Sons, Ltd.* [1960] 1 Lloyd's Rep. 59.

⁴⁸ *Fricke*, 76 L.Q.R. 248. *Contra*, Fullagar J. in *Darling Island Stevedoring Co. v. Long* (1957) 97 C.L.R. 86, 56.

⁴⁹ *Graham v. C. E. Heinke & Co., Ltd.* [1958] 1 Q.B. 432.

⁵⁰ The imposition of a statutory duty does not free the occupier of premises from his common law obligations; but if he complies with the statutory code of conduct it may be difficult to convict him of negligence: *Chipchase v. British Titan Products Co., Ltd.* [1956] 1 Q.B. 545.

by a workman injured as a result of a breach of the safety provisions of the Factories Act and Mines and Quarries Act.⁵¹ Breach of the duties imposed renders the occupier liable to criminal proceedings. But "The real incentive for the observance by employers of their statutory duties under Railway Acts, Factory Acts, Dock Acts, and similar legislation is not their liability to substantial fines, but the possibility of heavy claims for damages."⁵² The principal statute is now the Factories Act, 1961, consolidating the previous legislation. It imposes certain duties on, in general, the occupier of a factory—a term which is defined with great precision. Parts I, III and IV of the Act deal with health and welfare. They make provision for such matters as sanitation, ventilation, lighting, heating and overcrowding. Part II, the most significant for our purpose, makes stringent provision to secure the safety of workmen by imposing duties of which the following are the most important.

(1) Duty to fence

This is imposed by sections 12 to 16, and is the outstanding example of an absolute statutory obligation. By section 12 all prime movers (*i.e.*, the machines where power originates) must with few exceptions be securely fenced whether they are safe or not, and whatever their position or construction. By section 13 every part of the transmission machinery must be securely fenced unless it is in such a position or of such construction as to be as safe to every person working on the premises as it would be if securely fenced. By section 14, every dangerous part of any machinery, other than prime movers and transmission machinery, must be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced. Hence under section 14 (as distinct from section 13) the machinery must be proved to be dangerous before the duty to fence comes into existence. By sections 15 and 16 the fencing provided must be of sound construction and kept in position while the

⁵¹ It does not follow that the person injured can sue every person in breach of those provisions: *Biddle v. Truvox Engineering Co., Ltd.* [1952] 1 Q.B. 101 (supplier of defective machinery, as distinct from occupier of factory, not liable in damages).

⁵² *Hutchinson v. L. & N.E. Ry.* [1942] 1 K.B. 481, at 488, *per* Goddard L.J.

parts required to be fenced or safeguarded are in motion or in use,⁵³ unless the machinery is being examined, lubricated or adjusted.⁵⁴

Some of the points which have arisen in the many cases on these sections may be noted.

(i) Machinery is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur. Foreseeability is the test.⁵⁵ So careless or indolent conduct must be taken into account.⁵⁶

(ii) The obligation to fence securely is an absolute one, not to be qualified by any words such as "so far as practicable." Hence if dangerous machinery cannot be fenced securely it cannot lawfully be used at all.⁵⁷

(iii) The duty is owed not only to the actual operator but to all persons employed on the premises.⁵⁸ Hence the servant of an independent contractor may be protected.

(iv) The obligation is imposed in order to guard against contact with any dangerous part of a machine and not to guard against articles ejected from it. "The fence is intended to keep the worker out, not to keep the machine or its product in."⁵⁹ But there may be liability if the machine itself, as distinct from the material being worked, becomes dangerous as the result of the operation.⁶⁰ On the other hand, the duty does not in general require fencing against a tool which a man is holding coming into contact with the dangerous part of machinery,⁶¹ as distinct from the clothing on his body, which can be regarded as part of himself.⁶² It has also been held by the House of Lords,⁶³ that this duty does not require the dangerous part to be fenced for the

⁵³ *Stanbrook v. Waterlow & Sons, Ltd.* [1964] 1 W.L.R. 825.

⁵⁴ *Richard Thomas and Baldwins, Ltd. v. Cummings* [1955] A.C. 321.

⁵⁵ *Close v. Steel Co. of Wales, Ltd.* [1962] A.C. 367.

⁵⁶ *John Summers & Sons, Ltd. v. Frost* [1955] A.C. 740.

⁵⁷ *John Summers & Sons, Ltd. v. Frost* [1955] A.C. 740. But the Act gives the Minister power to modify this obligation as regards any particular class of factory.

⁵⁸ *John Summers & Sons, Ltd. v. Frost* [1955] A.C. 740.

⁵⁹ *Nicholls v. F. Austin (Leyton) Ltd.* [1946] A.C. 498, at 505, *per Lord Simonds*.

⁶⁰ *Cross v. Midland & Low Moor Iron & Steel Co., Ltd.* [1965] A.C. 343.

⁶¹ *Sparrow v. Fairey Aviation Co., Ltd.* [1964] A.C. 1019.

⁶² [1964] A.C. 1019, 1033, 1051-53.

⁶³ *Close v. Steel Co. of Wales, Ltd.* [1962] A.C. 367.

purpose of preventing fragments of it, if shattered, from flying out of the machine. In other words, the courts have so interpreted section 14 as to deprive the workman of protection against a foreseeable danger—a gap in the law which neither logic nor common sense can justify.⁶⁴

(2) Duties in relation to lifting tackle and machines

Every hoist or lift must be of good mechanical construction, sound material and adequate strength, and maintained in an efficient state, in efficient working order, and in good repair. The duty is absolute, so that the occupiers were held liable where a workman was killed as a result of the inexplicable failure of the braking mechanism of a lift.⁶⁵ Chains, ropes, and lifting tackle must also be of good construction.

(3) Duties concerning condition of premises

By section 25 all floors, steps, stairs, passages, gangways, and ladders must be soundly constructed and properly maintained.⁶⁶ There are also duties in relation to lighting, rails for staircases, and openings in floors. Although the duty is an absolute one, the obligation to maintain in an efficient state introduces a question of degree as to what is efficient: so a floor is not necessarily in an inefficient state because of some transient and exceptional condition.⁶⁷ But now the Factories Act, 1961, section 28 (1), provides that all floors, passages and stairs shall, so far as is reasonably practicable,⁶⁸ be kept free from any obstruction and from any substance likely to cause persons to slip. The slippery substance need not itself be in contact with the floor.⁶⁹ By section 29 (1) there must, so far as is reasonably practicable, be provided and maintained⁶⁶ safe means of access to every place at which any person has at any time to work, and every such work place

⁶⁴ *Eaves v. Morris Motors, Ltd.* [1961] 2 Q.B. 385, 397. See the interesting debate on these cases in 248 H.L. Deb. 5s., col. 1321-1358. The predominant opinion of the Lords (extra-judicially) was that it was really an engineering problem, and that there was no need to amend the Act.

⁶⁵ *Galashiels Gas Co. v. Millar* [1949] A.C. 275.

⁶⁶ "Maintained" is defined by s. 152 to mean "maintained in an efficient state, in efficient working order, and in good repair." This duty is absolute: *Hamilton v. National Coal Board* [1960] A.C. 633.

⁶⁷ *Latimer v. A.E.C. Ltd.* [1953] A.C. 643.

⁶⁸ So the duty is not absolute: *Braham v. J. Lyons & Co. Ltd.* [1962] 1 W.L.R. 1048.

⁶⁹ *Dorman Long (Steel) Ltd. v. Bell* [1964] 1 W.L.R. 333.

shall, so far as is reasonably practicable, be made and kept safe for any person working there. "Any person" means any person who is to work for the purposes of the factory.⁷⁰ This includes independent contractors and their servants,⁷¹ but would exclude (say) trespassers, or police officers pursuing trespassers, or firemen.⁷² It will be noted that the obligation of the occupier is only to do what is reasonably practicable.⁷³ There is a similar obligation to protect employed persons against inhalation of dust (s. 81).⁷⁴

(4) Duties relating to particular trades

Finally, Part IV of the Act gives power to make regulations for the conduct of dangerous trades or processes, and the Docks, Woodworking Machinery, Building, and Shipbuilding Regulations accordingly contain detailed rules for the protection of persons employed in those trades. It has been held that these regulations do not afford protection to one who is only a visitor to the factory.⁷⁵

Farms

The Agriculture (Safety, Health and Welfare Provisions) Act, 1956, and the very detailed Regulations made thereunder, impose duties on the occupiers of "agricultural units" and the employers of agricultural workers. A farm is now in the same position as a factory.

Offices and shops

The Offices, Shops and Railway Premises Act, 1963, imposes a wide range of duties to protect the health, safety and welfare of employees. Breach of these duties is certainly a criminal offence, and probably gives rise to civil liability in tort.

⁷⁰ *Wigley v. British Vinegars Ltd.* [1964] A.C. 307, 324.

⁷¹ *Wigley v. British Vinegars Ltd.* [1964] A.C. 307.

⁷² *Wigley's Case* [1964] A.C. at 313, 324.

⁷³ *Levesley v. Thomas Firth & John Brown Ltd.* [1953] 1 W.L.R. 1206, 1210.

⁷⁴ *Adsett v. K. & L. Steelfounders & Engineers Ltd.* [1953] 1 W.L.R. 773 (the unsuccessful plaintiff in this case was ordered to pay costs amounting to £970 by monthly instalments of five shillings: *Manchester Guardian*, October 23, 1954); *Richards v. Highways Ironfounders (West Bromwich) Ltd.* [1955] 1 W.L.R. 1049.

⁷⁵ *Hartley v. Mayoh & Co.* [1954] 1 Q.B. 383 (fireman).

Mines and quarries

The Mines and Quarries Act, 1954, and Regulations made thereunder, provide a complete code with respect to the management of mines and quarries. Certain duties are imposed on the owners⁷⁶ and managers⁷⁷ of mines. For example, by section 48 there is a duty to take such steps as may be necessary for keeping the road or working place secure.⁷⁸ This is not an absolute duty to ensure that a road is at all times secure, but is rather a duty to exercise care and skill in the light of the best engineering knowledge then obtainable.⁷⁹ This is a less onerous obligation than that imposed by the Act of 1911. Unfortunately it is not clear just how onerous the duty now is: all that can be said, rather unhelpfully, is that it is higher than the common law duty.⁸⁰ There is also a duty under section 81 to ensure that all parts and working gear are properly maintained.⁸¹ All the duties have to be read subject to the terms of section 157, which provides that it shall be a defence to prove that it was impracticable to avoid or prevent the contravention which is the subject of the proceedings. This, however, is an obligation of a stringent character.⁸²

§ 102. Nature of Statutory Duties

(1) Absolute

We have seen that some of these duties are absolute in the sense that the obligation, whatever its meaning and effect, must be actually fulfilled and not merely that the occupier of the factory must do his best to fulfil them.⁸³ The code of conduct

⁷⁶ By s. 159 an owner is civilly liable for breach of a statutory duty by his servant, even though Parliament has imposed the duty directly upon the servant and not the owner. This disposes of one of the problems raised in *National Coal Board v. England* [1954] A.C. 408. See below, § 191.

⁷⁷ The object of imposing duties on the manager personally is to ensure that some definite person is responsible; otherwise, in a large colliery, "what is everybody's business is nobody's business": *Brown v. N.C.B.* [1962] A.C. 574, 597.

⁷⁸ The coal face itself must be made secure: *Gough v. N.C.B.* [1959] A.C. 698.

⁷⁹ *Brown v. National Coal Board* [1962] A.C. 574.

⁸⁰ *Tomlinson v. Beckermets Mining Co. Ltd.* [1964] 1 W.L.R. 1043.

⁸¹ *Hamilton v. N.C.B.* [1960] A.C. 633.

⁸² See below, § 102.

⁸³ *Carroll v. Andrew Barclay & Sons Ltd.* [1948] A.C. 477, 487. It was suggested by the Monckton Committee on Alternative Remedies (Cmd. 6860, para. 82) that in an action for breach of a statutory duty designed

required is conclusively fixed by the statute. In such a case there is not so much a duty to perform as responsibility for circumstances.⁸⁴ At first sight, therefore, it might seem that these duties have little or nothing in common with the common law obligation to take reasonable care, which is in general measured by what is reasonably foreseeable in the circumstances. But the tendency of the decisions has been to introduce the notion of reasonable foreseeability in determining the true construction of the statutory obligation. So that whether part of a machine is "dangerous" so as to require it to be "securely" fenced, or placed in a "safe" position, or whether a floor is "maintained in an efficient state," involves a consideration of what ought reasonably to be foreseen.⁸⁵ But it is well settled that careless as well as careful conduct may have to be foreseen.⁸⁶

(2) "Practicable"

Other duties are not absolute, in the sense that the statute only requires what is "practicable" or "reasonably practicable" to be done. This is often treated as closely analogous to the common law obligation of a master to his servant,⁸⁷ but something more than reasonable care is required,⁸⁸ and what is "practicable" may require a higher standard than what is "reasonably practicable," although not as high a standard as "possible."⁸⁹ In general it may be said that the risk has to be balanced against the time, cost, efficiency, and trouble of remedial measures,⁹⁰ but, under "practicable," questions of cost may be eliminated, though what is done must still be possible in the

for the protection of workmen it should be a defence for an employer to prove that he had done everything reasonably practicable to prevent the breach. A clause to this effect was inserted in the Law Reform (Personal Injuries) Bill, but dropped by the Government on second reading: 449 H.C. Debates 2161-2166. Amongst other reasons, it was said that the imposition of absolute duty led to a high standard of care on the part of employers.

⁸⁴ *Brown v. National Coal Board* [1962] A.C. 574, 592.

⁸⁵ *Latimer v. A.E.C. Ltd.* [1953] A.C. 663; *John Summers & Sons Ltd. v. Frost* [1955] A.C. 740. See Goodhart, 67 L.Q.R. 7; Munkman, pp. 257-259.

⁸⁶ *John Summers & Sons Ltd. v. Frost* [1955] A.C. 740.

⁸⁷ See below, § 199.

⁸⁸ *Edwards v. National Coal Board* [1949] 1 K.B. 704, 709.

⁸⁹ *Jayne v. National Coal Board* [1963] 2 All E.R. 220.

⁹⁰ *Marshall v. Gotham Co. Ltd.* [1954] A.C. 360 (Lord Keith of Avonholm *dubitante*).

light of the relevant knowledge and resources at the time of the breach.⁹¹

Onus of proof

The plaintiff must prove (i) breach of duty, and (ii) that such breach caused the injury complained of. The ordinary standard of proof in civil actions applies: the plaintiff must make it appear that at least on a balance of probabilities the breach of duty caused or materially contributed to his injury.⁹² The House of Lords has emphasised the need for the plaintiff to prove causation.⁹³ An experienced steel erector was killed while carrying out dangerous work. He would not have been killed had he been wearing a safety belt. His employers were in breach of their statutory duty in not providing a safety belt for him. But the claim failed as it was not proved that the deceased was not wearing a belt because it was not provided; indeed, the evidence showed that if it had been, he would not have worn it. But probably the onus of proving that safety measures were not reasonably practicable rests on the defendant, as the facts are peculiarly within his knowledge.^{93a}

§ 103. Defences to Action for Breach of Statutory Duties

(1) *Volenti non fit injuria*

Consent is no defence when the defendant is an employer who is himself under a statutory duty to the plaintiff.⁹⁴ The reason for this rule is that it is contrary to public policy that where there is a statutory obligation on the employer the workman should contract out of it.⁹⁵ Hence to give statutory force to a common law obligation is by no means an otiose procedure.⁹⁶

⁹¹ *Adsett v. K. & L. Steelfounders & Engineers, Ltd.* [1953] 1 W.L.R. 197, 773; *Richards v. Highways Ironfounders (West Bromwich), Ltd.* [1955] 1 W.L.R. 1049; [1957] 1 W.L.R. 781.

⁹² *Bonnington Castings, Ltd. v. Wardlaw* [1956] A.C. 613.

⁹³ *McWilliams v. Arrol (Sir William) & Co., Ltd.* [1962] 1 W.L.R. 295. But it also said this must not be pressed too far: *Nicholson v. Atlas Steel, Ltd.* [1957] 1 W.L.R. 613.

^{93a} *Quinn v. Cameron & Robertson, Ltd.* [1958] A.C. 9.

⁹⁴ *Wheeler v. New Merton Board Mills* [1933] 2 K.B. 669.

⁹⁵ *I.C.I., Ltd. v. Shatwell* [1964] 3 W.L.R. 329.

⁹⁶ *Alford v. National Coal Board* [1952] 1 All E.R. 754, 757. The person on whom the obligation is laid will also usually be liable to criminal proceedings.

But consent is a defence to an employer when two workmen, each of whom is under a particular statutory duty, embark upon a joint enterprise in breach of that duty and then seek to hold the employer vicariously responsible for the resulting damage.⁹⁷ In such a case public policy requires that a workman in breach of his statutory duty should not be entitled to recover damages by luring a fellow-workman to join him⁹⁸ in the breach.⁹⁹

(2) Contributory Negligence

On the other hand, in *Caswell v. Powell Duffryn Collieries, Ltd.*¹ the House of Lords unanimously, though *obiter*, held that the contributory negligence of the plaintiff provides a good defence. Today the damages may be apportioned under the Law Reform (Contributory Negligence) Act, 1945. But in the case of breach of provisions designed for the protection of workmen, too high a standard of care must not be demanded.² The standard to be applied is that of the ordinary prudent workman, and the courts must "take into account all the circumstances of work in a factory, and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence."³ This principle is perhaps not entirely logical. For it seems that the same act may have different consequences when the injured man is the plaintiff suing his employers and where the employer is being sued by a

⁹⁷ *I.C.I., Ltd. v. Shatwell* [1964] 3 W.L.R. 329.

⁹⁸ If he acted alone, he would be met by the defence of delegation: see below, p. 368.

⁹⁹ [1964] 3 W.L.R. 329.

¹ [1940] A.C. 152. For this purpose there is not any difference between the duty imposed by one statute and another: *Sparks v. Edward Ash* [1943] K.B. 223, 239-240.

² *Lewis v. Denye* [1940] A.C. 921, 931. "The Factories Act is there not merely to protect the careful, the vigilant and the conscientious workman, but, human nature being what it is, also the careless, the indolent, the inadvertent, the weary, and even, perhaps, in some cases, the disobedient": *Carr v. Mercantile Produce Co.* [1949] 2 K.B. 601, at 608, *per* Stale J. In *Harrison v. Metropolitan-Vickers Electrical Co., Ltd.* [1954] 1 W.L.R. 324, 328, the same learned judge said that to attribute to such acts "the rather grim description of contributory negligence is like using an elephant rifle to shoot a rabbit."

³ *Flower v. Ebbw Vale Steel Co.* [1934] 2 K.B. 132, at 140, *per* Lawrence J.; approved in *John Summers & Sons, Ltd. v. Frost* [1955] A.C. 740. This lenient standard, however, does not necessarily apply to simple cases of common law negligence: *Staveley Iron & Chemical Co., Ltd. v. Jones* [1956] A.C. 627.

third party (including another employee) in respect of the same act or omission.⁴ Further, the distinction between the two standards of care has lost much of its justification since the Law Reform (Contributory Negligence) Act, 1945. Although on the whole the courts thus favour the injured workman, when the plaintiff began to repair a scaffolding in a way described as "fantastically wrong," he was held solely responsible for his consequent injuries.⁵ The employer is not relieved of liability merely because the workman at the time of the accident was also guilty of a breach of his own duty under the statute, although the workman's breach may be such as to provide evidence of his negligence.⁶ Finally, if it has been established that the injury would not have been caused if the employer's statutory duty had been performed, the onus is on the defendant to prove that the plaintiff's contributory negligence was a substantial or material co-operating cause.⁷ It is not for the plaintiff to show exactly how the accident happened.⁸

(3) Delegation

In some cases it is a defence to an action for breach of statutory duty that the employer has delegated the performance of it to the plaintiff himself, who is then without remedy if he is injured, for he is held to be the author of his own misfortune.⁹ The doctrine appears to have been invented in order to enable an employer to escape liability to a servant if the sole reason for the breach of statutory duty was the servant's own disobedience.¹⁰ But the doctrine fell into some disfavour and now is probably obsolete.¹¹ The proper approach now is to combine

⁴ *Ross v. Associated Portland Cement Manufacturers, Ltd.* [1964] 1 W.L.R. 768.

⁵ *Norris v. W. Moss & Sons, Ltd.* [1954] 1 W.L.R. 846; *Rushton v. Turner Bros. Asbestos Co. Ltd.* [1960] 1 W.L.R. 96 ("a crazy thing to do").

⁶ *Ross v. Associated Portland Cement Manufacturers, Ltd.* [1964] 1 W.L.R. 768. *A fortiori* where the employee in breach is acting under the employer's orders: *Laszczyk v. National Coal Board* [1954] 1 W.L.R. 1426 (plaintiff held 5 per cent. responsible).

⁷ *Caswell's Case* [1940] A.C. 152, 172.

⁸ *Dawson v. Murex, Ltd.* [1942] 1 All E.R. 188; *Smithwick v. National Coal Board* [1950] 2 K.B. 355.

⁹ *Smith v. Baveystock & Co.* [1945] 1 All E.R. 531.

¹⁰ For the position when two (or more) servants are jointly disobedient, see *I.C.I., Ltd. v. Shatwell* [1964] 3 W.L.R. 329.

¹¹ *Ross v. Associated Portland Cement Manufacturers, Ltd.* [1964] 1 W.L.R. 768.

the rule that the plaintiff must prove causation¹² with the principles of contributory negligence.¹³ The question is whether there has been some fault on the part of the employer which goes beyond or is independent of the fault on the part of the employee which as a result of the doctrine of vicarious liability constitutes a breach of statutory duty by the employer. In short, the fundamental question is: Whose fault was it?¹⁴

¹² See above, § 90.

¹³ See above, §§ 91-95.

¹⁴ *Ross v. Associated Portland Cement Manufacturers, Ltd.* [1964] 1 W.L.R. 768.

LIABILITY TO PERSONS INJURED ON DANGEROUS PREMISES

§ 104. Introduction ¹

THE principles discussed in this chapter apply only to persons who suffer injury while on another's premises. Injuries suffered as a result of the dangerous state of the premises by persons who have not entered fall within the tort of nuisance and are governed by different principles. It is essential to keep in mind where the accident takes place and why the plaintiff is in that place,² because the duty of the occupier of dangerous premises to the plaintiff who is injured on the highway or on adjoining land may differ materially from his duty to the plaintiff who suffers damage from the defective state of the premises after having entered upon them. "It does not escape me," Lord Simonds said,³ "that in the result a distinction which may appear capricious will exist between two cases. . . . The distinction has in fact been commented on in *Howard v. Walker*.³ But, my Lords, such distinctions must exist in the law so long at least as a distinction exists between public and private property, and it is ultimately upon that distinction, perhaps, that the different fates of my hypothetical victims depend."

What are premises

The principles which follow apply not only to real property but also to appliances or objects upon it of which the plaintiff has been invited or allowed to make use—for example, grandstands,⁴

¹ See Wright, "Invitation" (1953) 2 Univ. of W.A. Ann.L.Rev. 543; Marsh, "History and Comparative Law of Invitees, Licensees, and Trespassers" (1953) 69 L.Q.R. 182, 359; Report of the Law Reform Committee (1954, Cmd. 9805); Odgers, "Occupiers' Liability" [1955] C.L.J. 1; *ibid.* "Occupiers' Liability: a Further Comment" [1957] C.L.J. 39; Harper & James, Chap. 27.

² *Jacobs v. L.C.C.* [1950] A.C. 361, at 377.

³ [1947] K.B. 860, 866, *per* Lord Goddard C.J.

⁴ *Francis v. Cockrell* (1870) L.R. 5 Q.B. 501.

stagings,⁵ diving-boards,⁶ ships in dry dock,⁷ ladders,⁸ and electricity pylons.⁹ These principles also apply to movables such as ships,¹⁰ lifts,¹¹ and aeroplanes,¹² in so far as the injury complained of has arisen from the dangerous structural condition of the conveyance. But they do not govern an act of negligence by the driver of it in the course of transit,¹³ for it has been settled that the driver of a vehicle owes his passengers the same duty to take reasonable care for their safety whether they are gratuitous or fare-paying,¹⁴ while the common law duty of an occupier of premises was elaborately graduated according to the character of the entrant. These rules have now been confirmed by the Occupiers' Liability Act, 1957, section 1 (3), which provides that the rules thereby enacted¹⁵ in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable to an occupier of premises and his invitees and licensees would apply, to regulate the obligations of a person occupying or having control over any fixed or movable structure,¹⁶ including any vessel, vehicle or aircraft. But an occupier of premises does not necessarily occupy a chattel on them (e.g., a crane) so as to render him liable for the use made of it by a contractor.¹⁷

Who is responsible¹⁸

In dealing with dangerous premises it is necessary to distinguish between the responsibilities of the owner, those of the occupier or possessor, and those of third parties on the premises.

⁵ *Heaven v. Pender* (1883) 11 Q.B.D. 503.

⁶ *Perkowski v. Wellington Corporation* [1959] A.C. 53.

⁷ *London Graving Dock Co., Ltd. v. Horton* [1951] A.C. 737.

⁸ *Woodman v. Richardson* [1937] 3 All E.R. 866.

⁹ *Kenny v. Electricity Supply Board* [1932] I.R. 73; *McLaughlin v. Antrim Electricity Supply Co.* [1947] N.I. 23.

¹⁰ *Duncan v. Cammell Laird* [1946] A.C. 401, 420, 439, 446; *London Graving Dock Co. v. Horton* [1951] A.C. 737, 750.

¹¹ *Haseldine v. Daw* [1941] 2 K.B. 343, 358.

¹² *Fosbrooke-Hobbes v. Airwork, Ltd.* [1937] 1 All E.R. 108.

¹³ *Haseldine v. Daw & Sons, Ltd.* [1941] 2 K.B. 343, 373; *Carney v. Smith*, 1953 S.L.T. 74; Law Reform Committee (Third Report), para. 42; Occupiers' Liability Act, 1957, s. 5 (3).

¹⁴ *Kahn-Freund, The Law of Inland Transport* (3rd ed., 1956), p. 392 ("very remarkable from a legal point of view").

¹⁵ See below, § 107.

¹⁶ Would this include a ladder, unless it was integrated into a scaffolding?

¹⁷ *O'Malley v. Sheppard & Son, Ltd.* [1962] 2 Lloyd's Rep. 221.

¹⁸ See Winfield, *Tort*, pp. 284-285.

Generally speaking, liability in such cases is based on occupancy or control, not on ownership. The person responsible for the condition of the premises is he who is in actual occupation or possession of them for the time being, whether he is the owner of them or not. For it is he who has the immediate supervision and control and the power of permitting or prohibiting the entry of other persons.¹⁹ There may be difficulty in distinguishing between a lessor and a licensor,²⁰ but the courts have been reluctant to permit an occupier to divest himself of his responsibilities. So the defendants were held liable when they had "hired" out premises for a dance for four hours, but had retained the right to supply refreshments.²¹ "Dancing is hungry and thirsty work. A dance without refreshments would be what Lord Bowen called 'a melancholy spree.' The restaurant keepers were to supply the necessary restoratives in what had been, at all events up to 8 p.m., their own restaurant."²² Primarily, then, liability rests on the occupier and we will postpone until later consideration of the liabilities of the owner not in occupation²³ and of third parties.²⁴

Different classes of entrants

The position at common law was concisely summarised as follows: "Where a question arises, not between parties who are both present in the exercise of equal rights *inter se*, but between parties of whom one is the owner or occupier of the place and the other, the party injured, is not there as of right,²⁵ but must justify his presence there if he can, the law has long recognised three categories of obligation."²⁶ Such a person

¹⁹ The preceding sentences were cited with approval in the following cases: *Hartwell v. Grayson, Rollo and Clover Docks* [1947] K.B. 901, 917; *Napier v. Ryan* [1954] N.Z.L.R. 1234, 1242; and *Nicholls v. Lyons* [1955] N.Z.L.R. 1097, 1106. See also *Murdoch v. Scott*, 1956 S.C. 309, 312.

²⁰ See above, § 29.

²¹ *Kelly v. Woolworth & Co.* [1922] 2 I.R. 5.

²² [1922] 2 I.R. 5, at 8, *per* Ronan L.J.

²³ See below, § 115.

²⁴ See below, § 114.

²⁵ i.e., either a right arising under a contract (for which, see § 108), or a right conferred by some rule of statute or common law (for which, see § 111).

²⁶ *Latham v. Johnson (R.) & Nephew, Ltd.* [1918] 1 K.B. 398, at 410, *per* Hamilton L.J. (An "exceedingly comprehensive and able judgment": *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck* [1929] A.C. 358, at 370, *per* Lord Dunedin.)

may go to the premises (i) by the invitation, express or implied, of the occupier; (ii) with the leave and licence of the occupier; (iii) as a trespasser. These three categories were held to be exhaustive; the temptation to introduce further sub-divisions (*e.g.*, a category of persons who enter as of right) was resisted.²⁷ The whole matter was put in perspective by Lord Uthwatt in *Read v. Lyons* ²⁸:

“ The background is the original freedom of the landowner, keeping within his own bounds, to do what he liked with and on his own, the king’s law, save in felonies and trespass actions, stopping at his boundary. With the development of the law and the appearance of the conception of negligence as a general ground of liability, that freedom of action without liability for resulting harm has been curtailed, and to the rights of a landowner, now represented by the occupier, there have been attached the duties of a host. The result is that there is no general standard of duty. The circumstances attending the presence of the stranger have to be taken into account and determine the duty owed. Put broadly, the trespasser can complain of uncivilised conduct, and if a child, of the fascinations offered by the occupier’s land, to which, with resulting damage to himself, he has not unnaturally succumbed; the demands of a polite society are thereby satisfied; the bare licensee is entitled to assume that the gift to him possesses its face value as the occupier sees it but cannot otherwise call for a review of its character; courtesy is not to be repaid by ingratitude: and to the licensee with an interest commonly called an invitee . . . a duty of care is owed, the reason being that the invitee may reasonably expect his interests to be considered. . . . The common feature of the duties so far imposed on the occupier is that there is demanded of him a standard of conduct no higher than what a reasonably minded occupier of land, with due regard to his own interests, might well agree to be fair and no lower than a trespasser, bare licensee or invitee might in a civilised community reasonably expect.”

²⁷ *Addie v. Dumbreck* [1929] A.C. 358, 364; *London Graving Dock Co. v. Horton* [1951] A.C. 737, 764.

²⁸ [1947] A.C. 156, at 184–185.

§ 106. Nature and Value of Common Law Rules

It was settled that the rules on this topic were a special sub-head of the general doctrine of negligence.²⁹ But it is a subhead with some very special rules of its own, which should not be forgotten or confused.³⁰ Thus at common law the measure of the duty owed to one who is on the premises by the invitation of the occupier is to be found, not in the broad concept of reasonable foreseeability alone, but in that particular facet of it which is known as the rule in *Indermaur v. Dames*.³¹ Yet the law on the whole subject was still in a confused state on the eve of the passage of the Occupiers' Liability Act, 1957. The delineation between the various categories of persons entering on premises occupied by another was far from settled, nor was it possible to state with certainty the duties owed to persons falling within those categories. It may be that if it had been earlier and more generally recognised that the topic was only one branch of the law of negligence it might have been seen that the occupier's duties could not conveniently be put into straitjackets to fit the character in which the plaintiff came on the premises, and the law would then have been freed of some needless refinements and profitless distinctions.³² Yet even if this method of approach had been adopted some distinctions between the various classes of entrants would have been necessary, for as Atkin L.J. said,³³ "they correspond to real differences in the nature of the user of property and in the reasonable claims to protection of those who are permitted such use."

Need for Reform

Various reasons may be assigned for the state of confusion into which the law fell. Many of the circumstances which might have been considered in relation to the precautions required came in the course of time to be considered relevant only to the character in which the sufferer came on the premises³⁴; some

²⁹ *London Graving Dock Co. v. Horton* [1951] A.C. 737, 766; Lord Wright, 66 L.Q.R. 454.

³⁰ *Watson v. George* (1953) 89 C.L.R. 409, 418.

³¹ (1866) L.R. 1 C.P. 274. See below, § 109

³² The preceding sentences (now slightly altered) were cited by the Law Reform Committee (Cmd. 9305, s. 44).

³³ *Colehill v. Manchester Corporation* [1928] 1 K.B. 776, at 791.

³⁴ *Lipman v. Glendinnen* (1982) 46 C.L.R. 550, 555.

of the suggested distinctions may have been adequate for large country estates, but not for urban or suburban premises,³⁵ or for premises occupied by public authorities.³⁶ Another significant reason may be found in the peculiarly strict rule which prohibits the House of Lords from reversing one of its own previous decisions, however inconvenient or unjust that decision may seem to be in the light of changed social and economic circumstances. It has thus been necessary for the legislature in the Occupiers' Liability Act, 1957, to reverse at least three decisions of the House of Lords,³⁷ although this is a task which many feel that the Law Lords themselves would be better fitted to perform.³⁸

§ 106. Current Operations

Apart altogether from the Occupiers' Liability Act, the strictness of the common law was mitigated by cases in which the courts have held that an entrant who is injured as a result of current operations conducted on the premises by the occupier need not bring his claim within the established invitee-licensee-trespasser categories but might have a remedy on the simple ground that the defendant has not fulfilled his duty to take reasonable care for the safety of the plaintiff.³⁹ In one of the

³⁵ *Mooney v. Lanarkshire C.C.*, 1954 S.C. 245.

³⁶ *Aiken v. Kingborough Corporation* (1939) 62 C.L.R. 179, 190.

³⁷ *Cavalier v. Pope* [1906] A.C. 428; *London Graving Dock Co. v. Horton* [1951] A.C. 757; *Thomson v. Cremin* [1956] 1 W.L.R. 103n.

³⁸ See the remarks of Lord Reid on the Second Reading of the Occupiers' Liability Bill: 203 H.L. Deb. 5s., col. 262. Scottish lawyers always felt aggrieved by the decision in *Robert Addie & Sons (Collieries) v. Dumbreck* [1929] A.C. 358, which replaced the primitive simplicity of the law of delict by the more elaborate English doctrine. "That even greater inconveniences have arisen in the country of the doctrine's birth has not unnaturally been observed in Scotland with a certain smugness combined with a measure of admiration for the heroic, but hitherto unavailing, efforts of English lawyers to extricate themselves from what one of them has described as a morass": *Plank v. Stirling Magistrates*, 1956 S.C. 92, at 104, *per* Lord Thomson. But as the Court of Session also felt itself unable to escape from "the doctrine of the categories" by accepting an invitation to hold that it had been impliedly overruled by *Donoghue v. Stevenson* [1932] A.C. 562 (see *Stewart v. Glasgow Corporation*, 1958 S.C. 28), it was necessary to enact the Occupiers' Liability (Scotland) Act, 1960, which should be studied for its significant differences from the English statute.

³⁹ *Miller v. South of Scotland Electricity Board*, 1958 S.C.(H.L.) 20, 37-38. To use the terminology of Professor Newark, the distinction is between the occupier's "activity duty" and his "occupancy duty": Newark, "Twine v. Bean's Express Ltd." (1954) 17 M.L.R. 102, 109. But note that the occupier has been held entitled to exclude even his "activity duty" by a

most authoritative of these cases the court stated that its task was to choose between competing categories of the law of torts and to select one of them to the exclusion of the other.⁴⁰ In this case, in which a child had been electrocuted while climbing on the defendants' pylon (and so committing a technical trespass), the High Court of Australia selected as the basis of its decision the rule which imposes a high standard of care on those who carry on a dangerous activity (i.e., the supply of high-voltage electricity) in preference to the rule which exempts an occupier from any duty of care to a trespasser.⁴¹ Again, in relation to a licensee, in *Slater v. Clay Cross Co., Ltd.*⁴² the Court of Appeal held the defendants liable to the plaintiff (subject to a reduction of damages on the ground of her contributory negligence) when she had been knocked down by a train on the defendants' narrow gauge railway line. "The duty of the occupier is nowadays simply to take reasonable care to see that the premises are reasonably safe for people lawfully coming on to them: and it makes no difference whether they are invitees or licensees. At any rate, the distinction has no relevance to cases such as the present where current operations are being carried out on the land."⁴³ As the Judicial Committee has said: "If an occupier negligently drove a motor-car into a licensee, the principle that a licensee must take the land as he finds it would clearly have no application."⁴⁴ Again, such a duty has been held to arise when an

notice in adequate terms which have been sufficiently brought to the attention of the visitor: *Ashdown v. Williams (Samuel) & Sons, Ltd.* [1957] 1 Q.B. 409. See below, § 107.

⁴⁰ *Thompson v. Municipality of Bankstown* (1952) 87 C.L.R. 619, 623. The doctrine can perhaps be traced back through *Tolhausen v. Davies* (1888) 57 L.J.Q.B. 392 to *Tebbutt v. Bristol & Exeter Ry.* (1870) L.R. 6 Q.B. 73 and *Gallagher v. Humphrey* (1862) 6 L.T.(N.S.) 684, but the more recent decisions pray in aid of the neighbour principle in *Donoghue v. Stevenson* [1932] A.C. 562. See *Kennedy v. Union Estates, Ltd.* [1940] 1 D.L.R. 662; *Merrington v. Ironbridge Metal Works, Ltd.* [1952] 2 All E.R. 1101; *Burton v. Melbourne Harbour Trust* [1954] V.L.R. 645. Yet see *M'Phail v. Lanarkshire C.C.*, 1951 S.C. 301, 314; *Murdoch v. Scott*, 1956 S.C. 309.

⁴¹ The decision was expressly approved in *Commissioner for Railways v. Quinlan* [1964] A.C. 1054.

⁴² [1956] 2 Q.B. 264. See also *Dunster v. Abbott* [1954] 1 W.L.R. 58; *Slade v. Battersea Hospital Management Committee* [1955] 1 W.L.R. 207.

⁴³ *Per Denning L.J.* [1956] 2 Q.B. at 269. The Judicial Committee seem to have approved this view in *Perkowski v. Wellington Corporation* [1959] A.C. 53, 67, but to have disapproved it in *Commissioner for Railways v. Quinlan* [1964] A.C. 1054.

⁴⁴ *Perkowski v. Wellington Corporation* [1959] A.C. 53, at 67, *per Lord Somervell of Harrow.*

occupier, instead of merely licensing or inviting others to use his premises, himself undertakes to conduct and guide them through the premises.⁴⁵ The distinction between the duty owed by the occupier as such and that which arises when a servant of the occupier injures a visitor by a casual act of negligence can also be seen from the fact that in the first case the occupier alone is in general liable, while in the second master and servant are joint tortfeasors.⁴⁶ But the distinction between the occupier's "activity duty" and his "occupancy duty" appears to have been abolished by the Occupiers' Liability Act, for section 1 (1) provides that the rules enacted by the Act shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.⁴⁷ The only duty which the occupier today owes to his lawful visitors is the common duty of care.

§ 107. The Occupiers' Liability Act, 1957

The degree of criticism to which the state of the common law relating to the liability of occupiers of premises to their visitors had given rise induced the Lord Chancellor to refer the matter to the Law Reform Committee. The Report of the Committee,⁴⁸ which contains a full and valuable survey of the common law, made a number of recommendations which were in substance adopted by Parliament in the Occupiers' Liability Act, 1957, which came into force on January 1, 1958. The first and main

⁴⁵ *Heard v. N.Z. Forest Products, Ltd.* [1960] N.Z.L.R. 329, 362.

⁴⁶ *Mummery v. Irvings Proprietary, Ltd.* (1956) 96 C.L.R. 99, 110.

⁴⁷ The editor adheres to this view, despite the contrary opinions expressed by Odgers, [1957] C.L.J. 39-40; Winfield, *Tort*, p. 281; Street, *Torts*, pp. 181-182; Macintyre, [1959] J.P.L. 12. Those authors argue that the "activity duty" is not imposed in consequence of a person's occupation or control of premises. Even if this be true, it overlooks the long title of the Act, which is expressed "to amend the law as to the liability of occupiers and others." This point may be important in a case where the statutory duty has been varied "by agreement or otherwise": otherwise there would seem to be little difference between the common duty of care and the activity duty.

⁴⁸ 1954, Cmd. 9305. See Odgers, [1955] C.L.J. 1; [1957] C.L.J. 39; Heuston, 18 M.L.R. 271; Newark, "The Occupiers' Liability (Northern Ireland) Act" (1958) 12 N.I.L.Q. 203; Macintyre, "The Occupiers' Liability Act, 1957" [1958] J.P.L. 10, 93; Payne, "The Occupiers' Liability Act" (1958) 21 M.L.R. 359; Hutton, "Mechanics of Law Reform" (1961) 24 M.L.R. 18.

change effected by the Act is that the rules which it contains replace the rules of the common law under which the duty of an occupier differs according as the visitor is an invitee or a licensee. Section 2 (1) provides that an occupier of premises⁴⁹ owes the same duty, "the common duty of care," to all his lawful visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

Common duty of care

The common duty of care is defined (s. 2 (2)) as a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is permitted or invited to be there.⁵⁰ It will be noticed that it is the visitor who has to be made safe and not the premises. But it is important to note that the Act (s. 1 (2)) does not alter the common law as to the person on whom such a duty is imposed⁵¹ or to whom it is owed; accordingly the persons who are to be treated as an occupier and as his visitors are the same⁵² as the persons who would at common law be treated as an occupier and as his invitees or licensees.⁵³ The common duty of care is also owed to persons visiting the premises under a contractual right (s. 5), or in exercise of a right conferred by law⁵⁴ (s. 2 (6)). In short, the effect of the Act is to reduce the number of categories of visitors to two—lawful visitors and trespassers—and to provide that only one duty is owed to all lawful visitors.

⁴⁹ Which includes any fixed or movable structure, including any vessel, vehicle or aircraft: s. 1 (3).

⁵⁰ s. 2 proceeds to deal in greater detail with some of the circumstances which may be relevant in any particular case—*e.g.*, that the plaintiff is a child, or has knowledge of the danger, or that the occupier has employed an independent contractor to repair the premises. These points will be considered fully later.

⁵¹ The Act binds the Crown: s. 6.

⁵² But a person entering any premises in exercise of rights conferred by virtue of an access agreement or order under the National Parks and Access to the Countryside Act, 1949, is not, for the purposes of the Act, a visitor of the occupier of those premises: s. 1 (4).

⁵³ This is contrary to the recommendation of the Law Reform Committee, which was that the distinction between invitees and licensees should be abolished. The recommendation was not accepted because this part of the law is not sufficiently settled for codification: *see* Hylton-Foster, S.-G., on the Committee Stage of the Bill (Standing Committee A, March 26, 1957, col. 5).

⁵⁴ This does not include persons exercising a right of way: *below*, § 111.

Nature of common duty of care

As the duty is imposed by a statute it is arguable that this branch of the law is now no longer part of the law of negligence, but should be considered under the heading of actions for breach of statutory duty.⁵⁵ Even if this is so, the duty in question differs considerably from the ordinary statutory duty as it is phrased in such wide and general terms. It is a question of fact in any particular case whether the occupier has observed the standard required by the statutory duty.⁵⁶ "It is in effect hoping to replace a principle of the common law with a new principle of the common law: instead of having the judgment of Willes J. being construed as if it were a statute, one is to have a statute which can be construed as if it were a judgment of Willes J."⁵⁷ So probably in difficult cases the courts will have recourse to cases decided under the common law.⁵⁸

Nature of damage recoverable

At common law the better view was that the invitor's duty was to prevent damage not only to the person but also to the goods of an invitee.⁵⁹ The Occupiers' Liability Act, 1957, s. 1 (3) (b), affirms⁶⁰ and extends the common law by enacting that the common duty of care which an occupier owes to his lawful visitors covers the obligations of a person occupying or having control over any premises or structure in respect of damage to⁶¹ property, including the property of persons who are not themselves his visitors.⁶²

⁵⁵ See above, § 102.

⁵⁶ A number of cases have been reported in Lloyd's Reports, but they all seem to be on questions of fact.

⁵⁷ So the chief parliamentary draftsman: 24 M.L.R. at 28-29.

⁵⁸ See below, §§ 107-109.

⁵⁹ *The Cawood III* [1951] P. 270; *Workington Harbour & Dock Board v. Towerfield (Owners)* [1951] A.C. 112; *Drive-Yourself Lessey's Pty., Ltd. v. Burnside* (1959) S.R.(N.S.W.) 390. *Contra, Edwards v. West Herts Group Hospital Management Committee* [1957] 1 W.L.R. 415, 417, 422; Goodhart, 73 L.Q.R. 313.

⁶⁰ But see the doubts in Chapman, *Statutes*, pp. 50-51.

⁶¹ Street, *Torts*, pp. 187-188, says these words do not include loss of property: *sed quare*.

⁶² This would protect the interest of, say, a limited company which hired out a motor-vehicle which was lawfully brought on to the occupier's premises by the hirer: *Drive-Yourself Lessey's Pty., Ltd. v. Burnside* (1959) S.R.(N.S.W.) 390.

Can common duty of care be excluded or modified?

It is necessary first to see how the law stood before the Occupiers' Liability Act, 1957. If the visitor had entered under contract there was no doubt that the occupier could modify or exclude the duty which he would otherwise have owed by the insertion of appropriate terms in the contract. But if the visitor had entered by the invitation or licence of the occupier the position was not so clear. It was only on the eve of the passing of the Act that the Court of Appeal in *Ashdown v. Samuel Williams & Sons Ltd.*⁶³ approved the view that it is competent to an occupier of land to restrict or exclude any liability he might otherwise be under to any licensee of his, including his liability for his own or his servants' negligence, by conditions aptly framed and adequately made known to the licensee.⁶⁴

Section 2 (1) of the 1957 Act provides, as we have seen, that an occupier of premises owes the same duty, the "common duty of care," to all his lawful visitors, except in so far as he is free to⁶⁵ and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.⁶⁶ It is difficult to resist the conclusion that Parliament has authorised occupiers of premises to exempt themselves from the duty which they would normally owe to their lawful visitors by the simple device of exhibiting a notice which contains terms suitably framed for this purpose.⁶⁷ The person claiming exemption must of course

⁶³ [1957] 1 Q.B. 409. The decision was followed in *Mayor v. Ribble Motor Services, Ltd.*, unreported (1958) C.A. 261 (a case of negligence in transit on a vehicle: the C.A. held that as the document in question was a licence it was irrelevant to consider the Road Traffic Act, 1930, s. 97 (see now the Road Traffic Act, 1960, s. 151), which prohibited the insertion of clauses excluding liability in contracts). See Gower, 19 M.L.R. 582; 20 M.L.R. 181; Odgers, "Occupiers' Liability" [1957] C.L.J. 89.

⁶⁴ [1957] 1 Q.B. at 421, *per* Jenkins L.J. See also Parker L.J. at 427. (It should be noted that both these L.J.J. were members of the Law Reform Committee which produced the Report on Occupiers' Liability.)

⁶⁵ The occupier is not free in respect to visitors entering in pursuance of a contract between the occupier and a third party (see below, § 108), but in view of the decision in *Ashdown v. Samuel Williams & Sons, Ltd.*, *supra*, it is difficult to think of any other case in which the occupier is not so free. Perhaps the courts will not permit an occupier to exempt himself from liability to one who enters as of right.

⁶⁶ When the Bill was in Committee a proposal to delete the words "or otherwise" was defeated on the advice of Hylton-Foster, S.-G.: H.C. Standing Committee A, March 26, 1957, col. 30.

⁶⁷ But observe the significant difference in the wording of s. 2 (1) of the Occupiers' Liability (Scotland) Act, 1960, which makes it plain that Parliament has given no such freedom to the Scottish occupier.

show that he did all that was reasonably necessary in the circumstances to bring the terms to the attention of the visitor. Once that is shown it makes no difference that the visitor deliberately did not read the conditions, or unreasonably failed to do so.⁶⁸

Contributory negligence. It is generally believed that the defence of contributory negligence is available.⁶⁹ Contributory negligence is not, of course, in itself a bar to the plaintiff's claim since the Law Reform (Contributory Negligence) Act, 1945, but merely a ground for the reduction of damages.

Effect of knowledge of danger. Even if the occupier has not exempted himself from liability by means of "agreement or otherwise" under section 2 (1) of the Act, he may still be exonerated from liability in whole or in part by reason of the visitor's knowledge of the danger. This may happen in three ways.

(1) Section 2 (5) of the Act provides that the common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his⁷⁰ by the visitor. The question whether a risk was so accepted is to be decided on the same principles as in other cases in which one person owes a duty of care to another.⁷¹ This is of great importance when the plaintiff is a workman who is on the defendant's premises in pursuance of his contract of employment with a third party. Before the Act the House of Lords had held in *Horton's* case⁷² that if such a servant had full appreciation of the danger he could not, in an action against the occupier, plead that by reason of his contract of service he was not free to accept or reject the risk, for his contract of service was no concern of the occupier. *Horton* should have sued his employers.⁷³

(2) The Act recognises the common law principle that a danger may cease to be a danger to those who know of it. But in each case it is to be a question of fact whether the visitor's

⁶⁸ See Parker L.J. in [1957] 1 Q.B. at 430.

⁶⁹ The Law Reform Committee (para. 95) specifically recommended that the defence should be available, though the Act itself is silent on the point. See *Percival v. Hope Gibbons, Ltd.* [1959] N.Z.L.R. 642.

⁷⁰ For an illustration, see *Vickers v. B.T.C. Docks Board* [1964] 1 Lloyd's Rep. 275.

⁷¹ For these principles, see above, §§ 12-14.

⁷² [1951] A.C. 787.

⁷³ See *Smith v. Austin Lifts, Ltd.* [1959] 1 W.L.R. 100. *Horton's* case is no longer law: below, p. 389.

knowledge of the danger relieves the occupier from liability, for section 2 (4) provides that in determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example), where damage is caused to a visitor by a danger⁷⁴ of which he has been warned by the occupier, the warning is not to be treated without more as absolving the occupier⁷⁵ unless in all the circumstances it was enough⁷⁶ to enable the visitor to be reasonably safe.⁷⁷

(8) Knowledge of a danger may be evidence of contributory negligence on the part of a person injured by it.

§ 108. Lawful Visitors: (1) Under Contract

At common law there was much dispute about the scope and nature of the term to be implied in a contract relating to entry upon premises in favour of the entrant. But now Parliament has considerably simplified the law: it has provided that visitors under contract shall be entitled to the common duty of care⁷⁸ in the absence of any express provision in the contract governing the matter.

Section 5 of the Act provides that when persons enter or use, or bring, or send goods to, any premises⁷⁹ in exercise of a right conferred by contract⁸⁰ with a person occupying or having control of the premises, the duty he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, shall be the common duty of care.⁸¹ The section does not

⁷⁴ Does this mean the peril itself or the facts or events which have created that peril?

⁷⁵ What is the effect of a warning given by a stranger?

⁷⁶ As it was in *Roles v. Nathan* [1963] 1 W.L.R. 1117.

⁷⁷ Distinguish the warning which discharges the common duty of care (s. 2 (4) (a)) from the warning which excludes it (s. 2 (1)).

⁷⁸ Although the statute (s. 1 (1)) expressly abolishes the common law rules only in relation to invitees and licensees, it is inconceivable that Parliament intended them to subsist in relation to contractual visitors.

⁷⁹ A term which includes fixed and movable structures: s. 5 (2). See above, § 105.

⁸⁰ The section does not apply to contracts entered into before January 1, 1958.

⁸¹ As this duty is imposed or implied by the law and not by the parties it would seem that a claim for its breach should properly be regarded as a claim in tort. But s. 5 of the Act is preceded by the cross-heading "Liability in contract."

affect the obligations imposed on a person by or by virtue of any contract for the hire of, or for the carriage for reward of persons or goods in, any vehicle, vessel, aircraft or other means of transport, or by or by virtue of any contract of bailment.

Effect of contract on occupier's liability to third party. The Occupiers' Liability Act, section 3 (1), provides that where an occupier of premises is bound by contract to permit persons who are strangers to the contract⁸² to enter or use the premises, the duty of care which he owes to them as his visitors cannot be restricted or excluded by that contract,⁸³ but (subject to any provision of the contract to the contrary) shall include the duty to perform his obligations under the contract,⁸⁴ whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty. So a visitor to a tenant will always be entitled at the least to the benefit of the common duty of care; he will also be entitled to the benefit of any additional obligation undertaken by the lessor towards the lessee, unless the former has expressly excluded such an obligation. Section 3 (4) also provides that the same principles shall apply when by the terms or conditions governing any tenancy (including a statutory tenancy) either the landlord or the tenant is bound, though not by contract, to permit persons to enter or use premises of which he is the occupier.

§ 109. Lawful Visitors: (2) Invitees

(1) Who is an invitee

At common law entry by permission of the occupier is of two kinds. The permission amounts either to an invitation or to a mere licence. A person invited to enter is commonly referred to as an invitee,⁸⁵ or a licensee with an interest, while he who is

⁸² Defined by s. 3 (3) to mean persons not for the time being entitled to the benefit of the contract as parties to it or as the successors by assignment or otherwise of a party to it.

⁸³ Such a lawful visitor is therefore in a peculiarly favourable condition, for normally (see above, § 107) the common duty of care can be restricted or excluded.

⁸⁴ Note that an occupier who has taken all reasonable care is not responsible for the defaults of an independent contractor unless the contract expressly provides otherwise: s. 3 (2).

⁸⁵ "To use a non-English word made common, if not invented, by our judges": *Haseldine v. Daw (C. A.) & Son, Ltd.* [1941] 2 K.B. 343, at 350, *per* Scott L.J.

merely licensed to enter is distinguished as a licensee, or bare licensee. The leading case is *Indermaur v. Dames*,⁸⁶ in which the occupier of a factory was held liable to the plaintiff, who was the servant of a gasfitter who had contracted to do certain work for the defendant, and who, while testing certain gas-fittings on the defendant's premises, fell through an unfenced opening in one of the upper floors. Willes J.⁸⁷ said:

"It was also argued that the plaintiff was at best in the condition of a bare licensee or guest, who, it was urged, is only entitled to use the place as he finds it, and whose complaint may be said to wear the colour of ingratitude so long as there is no design to injure him.

We think this argument fails, because the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission. . . . The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier and upon his invitation, express or implied."

Common interest required

The law then, rather paradoxically, requires something more than an express or implied invitation to enter upon premises to constitute the entrant an invitee. What that something more may be has been disputed. Salmond thought it sufficient if the occupier had a material interest in the visitor's presence. He defined an invitee as a person who enters on the premises by the permission of the occupier granted in a matter in which the occupier himself has some pecuniary or material interest. He is a person who receives permission from the occupier as a matter of business and not as a matter of grace. An invitation is a request to enter for the purposes of the occupier; a licence is a permission to enter for the purposes of the entrant himself. The invitor says: "I ask you to enter upon my business." The licensor

⁸⁶ (1866) L.R. 1 C.P. 274; 2 C.P. 311.

⁸⁷ "One of the greatest jurists of this or any other time": *Bowen v. Hall* (1881) 6 Q.B.D. 833, at 342, *per* Lord Coleridge C.J.

says: "I permit you to enter upon your own business."⁸⁸ But in *Pearson v. Lambeth B.C.*⁸⁹ Asquith L.J., although describing this formula as "succinct and vivid" and "justly commended," criticised it because it might suggest that the presence or absence of an interest in the occupier was the exclusive test. "This is, of course, not what is meant. It is more exact to say that an invitee is a person who comes on the occupier's premises with his consent on business in which the occupier and he have a common interest." This requirement of community of interest is to be found in many of the cases,⁹⁰ and was approved in *Jacobs v. L.C.C.*,⁹¹ in which the question was whether a customer at a shop, occupied by a tenant of the defendants, who suffered personal injuries from the defective state of the forecourt, occupied by the defendants, was their licensee or their invitee. Lord Simonds, whose judgment was concurred in by the other members of the House, held that the plaintiff was a licensee because three of the Law Lords in the rather similar case of *Fairman v. Perpetual Investment Building Society*⁹² had expressed the view that such was the status of a person in those circumstances. On this approach it was, of

⁸⁸ This passage was cited with approval in *Ellis v. Fulham Borough Council* [1938] 1 K.B. 212, 234, *per* Mackinnon L.J. ("the best definition"), and in *Slade v. Battersea Hospital Committee* [1955] 1 W.L.R. 207, 210, *per* Finemore J.

⁸⁹ [1950] 2 K.B. 353, at 366. He was less critical in *Sutton v. Bootle Corporation* [1947] 359, at 366.

⁹⁰ See Law Reform Committee, para. 7.

⁹¹ [1950] A.C. 361. See Goodhart, "The 'I Think' Doctrine of Precedent: Invitor and Licensors" (1950) 66 L.Q.R. 374.

⁹² [1923] A.C. 74. The plaintiff, a lodger of one of the tenants in a block of flats, caught her heel in a depression on the common staircase, which was in the occupation of the landlords. It had been suggested that under modern conditions a landlord clearly had a material interest in providing proper means of access to his flats or offices (at any rate for business visitors of his tenants, for their presence might enable the tenant to pay his rent more easily) and that the *Fairman* case laid down no general rule as to the status of the tenant's visitors *vis-à-vis* the landlord: *Haseldine v. Daw* [1941] 2 K.B. 343, 371; *Jacobs v. L. C. C.* [1949] 1 K.B. 685, 700. In any case it was arguable that the statements in the *Fairman* case were *obiter dicta*: *Pearson v. Lambeth B.C.* [1950] 2 K.B. 353, 361; *Heuston*, 66 L.Q.R. 33. But in the *Jacobs* case the H.L. held that these statements were not *obiter dicta*. This seems a correct deduction from the principles governing the distinction between *ratio decidendi* and *obiter dicta*. "Before the court [in *Fairman*] could decide whether on the facts there was a failure in duty it had to have before it very clearly the legal duties owed, and that seems to me to be an inherent consideration for the determination of the case": *Stewart v. Glasgow Corporation*, 1958 S.C. 28, at 33, *per* Lord Wheatley.

course, unnecessary to consider the principles on which a distinction may be drawn between an invitee and a licensee, and the problem still awaits an authoritative review. On the authorities the following have been classified as invitees: customers in a shop,⁹³ persons visiting sick relatives in hospital,⁹⁴ persons visiting sick strangers at their home,⁹⁵ persons meeting relatives arriving by train,⁹⁶ workmen employed by sub-contractors,⁹⁷ and firemen.⁹⁸ But the invitee of the tenant of a dwelling-house⁹⁹ or a shop¹ is only a licensee of the landlord. A person visiting a ship in dock is sometimes an invitee,² and sometimes not.³

Area of invitation

The duty owed to an invitee is limited to those places to which he might reasonably be expected to go, in the belief, reasonably entertained, that he was entitled or invited to do so, and to the use of those premises in the ordinary way.⁴ If the invitee goes outside the area of invitation he is a trespasser or at best a licensee. It is a question of fact whether in all the circumstances of the case the invitor has taken reasonable steps to warn his invitee of the existence and scope of the prohibited area.⁵

Who is an invitor

We have seen that normally the duties of an invitor attach to the person in occupation or possession or control. This

⁹³ *Indermaur v. Dames* (1866) L.R. 1 C.P. 274.

⁹⁴ *Slade v. Battersea Hospital Management Committee* [1955] 1 W.L.R. 207.

⁹⁵ *Jennings v. Cole* [1949] 2 All E.R. 191.

⁹⁶ *Bloomstein v. Railway Executive* [1952] 2 All E.R. 418.

⁹⁷ *London Graving Dock Co., Ltd. v. Horton* [1951] A.C. 737.

⁹⁸ *Hartley v. Mayoh & Co., Ltd.* [1954] 1 W.L.R. 355.

⁹⁹ *Fairman v. Perpetual Investment Building Society* [1923] A.C. 74.

¹ *Jacobs v. L.C.C.* [1950] A.C. 861; *Percival v. Hope Gibbons, Ltd.* [1959] N.Z.L.R. 642.

² *Smith v. London, etc., Dock Co.* (1868) L.R. 3 C.P. 326.

³ *Kininmonth v. France, Fenwick & Co., Ltd.* (1949) 82 Ll.L.Rep. 768.

⁴ *Mersey Docks and Harbour Board v. Proctor* [1923] A.C. 253; *Hillen v. I.C.I. (Alkali), Ltd.* [1936] A.C. 65; *Danluck v. Birkner* [1947] 3 D.L.R. 337 (patron of illegal betting establishment injured when leaving by an unusual way in fear of police raid); *Braithwaite v. South Durham Steel Co., Ltd.* [1958] 1 W.L.R. 986. "When you invite a person into your house to use the staircase you do not invite him to slide down the bannisters": *The Carlgarth* [1927] P. 93 at 110, per Scrutton L.J.

⁵ *Pearson v. Coleman Bros.* [1948] 2 K.B. 359. This is one of the many cases where the plaintiff has been injured while in search of a lavatory. See also the cases on the area of a licence, below, § 110.

general principle is subject to two qualifications. First, as occupation need not be exclusive, there may be more than one invitor liable to the same invitee in respect of the same damage.⁶ Secondly, an invitor may have an interest in or control over the premises which falls short of exclusive occupation. It may well be that if A invites B on to the premises of C in pursuance of some common material interest he must either take reasonable care to ensure that C's premises are reasonably safe for the purpose in hand or else warn B that he has not done so.⁷

(2) Common law duty

The scope of the duty owed at common law by an invitor to an invitee was laid down by Willes J. in *Indermaur v. Dames*⁸: "And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his own part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that where there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer must be determined by a jury as a matter of fact." This carefully worded passage was discussed in scores of cases in the subsequent years and the law became subtle and confused in many respects before the Occupiers' Liability Act. As the Act specifically provides, in section 1 (1), that the rules which it enacts shall have effect "in place of the rules of the common law," those rules are now only of historical interest and need not be considered here. It is enough to say that the leading distinction between an invitor and a licenser was that the former was liable not only for dangers of which he knew but also for those which he ought to have known.

(3) Statutory duty

The duty which an occupier now owes to an invitee is, under the Occupiers' Liability Act, s. 2 (2), the common duty of care—

⁶ *Burton v. Melbourne Harbour Trust Commissioners* [1954] V.L.R. 645; *Creed v. McGeoch & Sons, Ltd.* [1955] 1 W.L.R. 1005.

⁷ *Hartwell v. Grayson, Rollo and Clover Docks Ltd.* [1947] K.B. 901, 913; *MacDonald v. Goderich (Town of)* [1949] 3 D.L.R. 788.

⁸ (1866) L.R. 1 C.P. 274, at 287.

i.e., a duty to take such care as in all the circumstances of the case is reasonable to see that the invitee will be reasonably safe in using the premises for the purposes for which he is invited to be there. The Occupiers' Liability Act, s. 2 (3), by way of affirming the common law, also provides that the circumstances relevant to an assessment of the common duty of care owed in any particular case include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases an occupier (1) must be prepared for children to be less careful than adults, and (2) may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so. "For example, if a window-cleaner (not being a servant of the occupier) sustains injury through the insecurity of some part of the exterior of the premises which he uses as a foothold or handhold for the purpose of cleaning the outside of the windows, the occupier merely as such should not be liable. *Aliter*, if the window-cleaner is injured through some defect in the staircase when going upstairs in the ordinary way to reach the windows on an upper floor."⁹ An occupier is entitled to assume that a chimney-sweep will guard against dangers from flues.¹⁰

An invitee is, however, entitled to assume that the premises are in a fit state for his reception: he need not adopt the wary attitude which a prudent licensee will assume in self-protection—unless, indeed, the nature of the premises would warn a prudent man to do so.¹¹ So as it is usual to descend a ladder feet first the opportunities for seeing a defective rung are almost nil.¹² The courts are readier today than in the past to find that the plaintiff was not taking reasonable care for his own safety since they now have the power to apportion the loss in cases of contributory negligence. If the invitee is aware of the

⁹ Third Report of the Law Reform Committee, para. 77. See *Bates v. Parker* [1959] 2 Q.B. 281. If the window-cleaner were the servant of a contractor he might have an action against his employer: see below, § 199.

¹⁰ *Roles v. Nathan* [1963] 1 W.L.R. 117. This is one of the few reported cases on the Act which raises a point of law.

¹¹ The preceding two sentences were cited with approval by Kingsmill Moore J. in *Reaney v. Thomas Lydon & Sons, Ltd.* [1957] Ir.Jur.Rep. 1, at 3.

¹² *O'Krane v. Alcyon Shipping Co., Ltd.* (1960) 24 D.L.R. (2d) 119, 123.

danger he may be defeated for other reasons,¹³ but knowledge is now no more than evidence of contributory negligence.

Effect of knowledge

The duty under *Indermaur v. Dames* was really founded, not on the existence of the danger but on the failure of the occupier to prevent damage from it. In some cases such damage might be prevented by giving notice of the danger to the invitee; in other cases the notice or knowledge might not enable the invitee to avoid the danger if he was effectively to accomplish the purpose for which he had entered the premises. In the latter case the better view was that the invitor's duty was not discharged by the mere fact that the invitee knew as much (or more) about the danger as the invitor did. It was a question of fact whether in all the circumstances he had taken reasonable care for the safety of the entrant.¹⁴ It is true that in *Horton's* case¹⁵ a bare majority of the House of Lords held that the invitor's duty was discharged or at an end if he could show that the invitee encountered the danger with full knowledge and appreciation of the risk involved. The fact that the invitee was not really a free agent in accepting the risk because he was under a contract of service with a third party was held to be irrelevant in an action against the occupier.¹⁶ The decision was criticised by the Law Reform Committee,¹⁷ which reported in favour of a change in the law. So the Occupiers' Liability Act, s. 2 (4), now provides, as we have seen,¹⁸ that where damage is caused to a visitor by a danger of which he has been warned by the occupier, the warning is not to be treated without more as absolving

¹³ e.g., because of *volenti non fit injuria*, or because the invitor's duty is discharged.

¹⁴ *Long v. Saorsiat and Continental Steamship Co., Ltd.* (1953) 98 I.L.T.R. 137.

¹⁵ [1951] A.C. 737.

¹⁶ See also above, § 107. It should be remembered that an invitee who was defeated at common law by reason of his knowledge of the risk might have a claim under the Factories Act, 1961—e.g., for failure to provide safe means of access so far as is reasonably practicable (s. 29), a section which the plaintiff in *Indermaur v. Dames* would no doubt invoke today—and such a claim is not defeated by knowledge of the risk.

¹⁷ Cmd. 9805, ss. 77–78. The decision in *Horton's* case was criticised more severely than almost any other decision of the House of Lords in modern times: see Wright, 67 L.Q.R. 532; Goodhart, *ibid.* 428; Chapman, 73 L.Q.R. 406.

¹⁸ Above, § 107.

the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe.

Liability for third parties

The invitor's duty most commonly has reference to the structural condition of the premises, but it may also be extended to include the use which he (or whoever has control so far as is material) permits a third party to make of the premises.¹⁹ The occupier has the power of immediate supervision and control and the power of permitting or prohibiting the entry of other persons and he is under a duty to take reasonable care to prevent damage, at least from unusual danger, arising from such acts of third parties as could reasonably be foreseen.²⁰ So the occupier of a theatre has been held liable for a dangerous show put on by an independent contractor,²¹ and the occupiers of a club or restaurant for assaults committed by intoxicated guests.²² But the owner of a camp-site was not liable when one visitor injured another in the course of giving a driving lesson.²³

Independent contractors

In *Thomson v. Cremin* in 1941²⁴ it was said in the House of Lords that an invitor's duty to his invitee was personal in the sense that it could not be discharged merely by entrusting its performance to an independent contractor, however competent he appeared to be and however technical the nature of the work which he was employed to do. This was generally thought to interpret the occupier's duty to take reasonable care of his invitee's safety in too severe a sense. Now in accordance with the recommendation of the Law Reform Committee²⁵ the Occupiers' Liability Act, s. 2 (4) (b), provides that where damage is caused to a visitor by a danger due to the faulty

¹⁹ *Glasgow Corporation v. Muir* [1943] A.C. 448, 463.

²⁰ *Simons v. Winslade* [1938] 3 All E.R. 774 (vomit in yard of public-house, unknown to occupier); *Hobson v. Bartrams, Ltd.* [1950] 1 All E.R. 412 (Argentine sailors leaving hatch-covers off).

²¹ *Cox v. Coulson* [1916] 2 K.B. 177.

²² *Lehnert v. Nelson* [1947] 4 D.L.R. 473. Cf. *Adderley v. Great Northern Ry.* [1905] 2 I.R. 378 (assault by drunken fellow-passenger).

²³ *Crickmar v. Cleaver, The Times*, October 8, 1964.

²⁴ [1953] 2 All E.R. 1185; [1956] 1 W.L.R. 103n.; *sub nom. Cremin v. Thomson* (1941) 71 Ll.L.R. 1.

²⁵ Cmd. 9305, p. 34.

execution of any work of construction, maintenance or repair²⁶ by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to him and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

§ 110. Lawful Visitors: (3) Licensees

(1) Who is a licensee

A licensee, at common law,²⁷ is one who enters on the premises by the permission of the occupier, granted gratuitously in a matter in which the occupier has no interest. Often the occupier neither knows nor cares whether the licensee is making use of the permission granted to him, and, at least until recent years, he was entitled to withdraw the permission at any time.²⁸ The typical example is a gratuitous licence to use a way across the occupier's land for purposes which exclusively concerns the licensee himself. Another example is a guest receiving hospitality in a private house,²⁹ for "The law does not take account of the worldly advantage which the host may remotely have in view."³⁰ After considerable controversy it was settled that persons visiting a tenant or his family are licensees so far as any part of the premises which remains in the landlord's occupation is concerned.³¹ It is also settled that persons visiting public parks or recreation grounds are licensees.³²

Implied licences

A licence may be granted either expressly or impliedly, but one who claims that he is an implied licensee must show that the occupier has permitted his presence and not merely tolerated it. This is a question which most often arises in relation to children,³³ but the principles apply also to adult visitors. An occupier who resigns himself to the occasional and perhaps inevitable

²⁶ Would this cover (say) demolition? See below, § 202.

²⁷ Above, § 29.

²⁸ Above, § 29.

²⁹ *Pitt v. Jackson* [1939] 1 All E.R. 129, 132.

³⁰ *Latham v. Johnson* [1913] 1 K.B. 398, at 410, *per* Hamilton L.J.

³¹ *Jacobs v. L.C.C.* [1950] A.C. 361.

³² See below, § 111.

³³ See further below, § 113.

presence of trespassers on his property does not thereby take upon himself the obligations of a licensor.³⁴ "Permission must be proved, not tolerance, though tolerance in some circumstances may be so pronounced as to lead to a conclusion that it was really tantamount to permission," e.g., "a mere putting up of a notice 'No Trespassers Allowed' or 'Strictly Private,' followed, when people often come, by no further steps, would, I think, leave it open for a judge or jury to hold implied permission."³⁵ But it is not sufficient to make the plaintiff a licensee merely to prove that the occupier has not taken such measures as effectually to stop trespass. "There is no duty on a proprietor to fence his land against the world under sanction that, if he does not, those who come over it become licensees."³⁶ An unauthorised invitation by a servant of the occupier, acting outside the scope of his authority, to enter upon the premises will not prevent the person who accepts the invitation from being a trespasser.³⁷ For this reason it is submitted that a plaintiff who is on premises in breach of some by-law imposing penalties can never plead that he is there by leave and licence³⁸: it is against the policy of the law to permit anyone to license another to commit a crime.³⁹ For a man (or a child) is none the less a trespasser because he does not realise that he is a trespasser.⁴⁰

³⁴ This sentence was cited with approval by Devlin J. in *Phipps v. Rochester Corporation* [1955] 1 Q.B. 450, 455, and by Macfarlane J. in *Koehler v. Pentecostal Assemblies* (1957) 7 D.L.R. (2d) 614, 621.

³⁵ *Addie & Sons v. Dumbreck* [1929] A.C. 358, at 372, per Lord Dunedin. But "an open gate or an unfenced field does not amount to an invitation or licence *urbi et orbi* to enter upon private property": *Kenny v. Electricity Supply Board* [1932] I.R. 73, at 84, per FitzGibbon J.

³⁶ [1929] A.C., at 372. Cf. *Edwards v. Railway Executive* [1952] A.C. 737, at 746, per Lord Goddard C.J.: "But repeated trespass of itself confers no licence; the owner of a park in the neighbourhood of a town knows probably only too well that it will be raided by young and old to gather flowers, nuts or mushrooms whenever they get an opportunity. But because he does not cover his park wall with a *chevaux de frise* or post a number of keepers to chase away intruders how is it to be said that he has licensed what he cannot prevent?"

³⁷ *Hillen v. I.C.I. (Alkali)* [1936] A.C. 65; *Conway v. Wimpey, Ltd.* [1951] 2 K.B. 266.

³⁸ *Rich v. Commissioner for Railways (N.S.W.)* (1959) 101 C.L.R. 135, 143.

³⁹ See above, § 15.

⁴⁰ *Conway v. Wimpey, Ltd.* [1951] 2 K.B. 266, 273. But involuntary trespassers sometimes have a right of action where voluntary trespassers have not (*Deane v. Clayton* (1817) 7 Taunt. 489, 519; *Braithwaite v. South Durham Steel Co., Ltd.* [1958] 1 W.L.R. 986) and an occupier may be liable in nuisance to those who accidentally deviate from a highway when he would

Test objective

It is not clear how far the state of mind of a visitor who relies upon an implied licence is relevant. Is it enough for such a visitor to show that the occupier has sufficiently expressed his consent for the entry of a class of persons, of whom the plaintiff is one, or must he show that he has personal knowledge of the acts of the occupier which are alleged to constitute a licence? A dictum favours the latter view,⁴¹ but the former view seems more consistent with the objective test of knowledge which is applied when it is the state of mind of the licensor which is in issue.

(2) Common law duty: the old law

The occupier of premises is under no obligation to a licensee to make them safe for use by him. A mere licensee must be content to take the premises as they are.⁴² This rule, however, is subject to three important qualifications.

First, although the occupier is not bound to use any care to make the premises safe for the use of a mere licensee, he is under an obligation to give warning to such a licensee of the existence of any concealed danger which exists on the premises and is known to the occupier. He is not entitled knowingly to lead even a bare licensee into a trap.⁴³ A trap involves the idea of concealment and surprise: there must be something like fraud before the occupier can be responsible; he is in a position analogous to that of a donor.⁴⁴ The licensee cannot saddle the occupier with any more onerous obligation merely because the latter has made changes in the condition of the land after he has gone into occupation.⁴⁵ The question is simply whether the defect in question amounts to a trap. Nor does it make any difference that the concealed danger is of risk of injury outside the licensed area, for example, by falling over a cliff into the sea.⁴⁶

not be liable to one who did so intentionally: *Barnes v. Ward* (1850) 9 C.B. 392.

⁴¹ *Edwards v. Railway Executive* [1952] A.C. 737, 748.

⁴² *Perkowski v. Wellington Corporation* [1959] A.C. 53.

⁴³ The three preceding sentences were cited with approval by Singleton J. in *Baker v. Bethnal Green B.C.* [1944] 2 All E.R. 301, 305.

⁴⁴ *Gautret v. Egerton* (1866) L.R. 2 C.P. 371, 375; *Perkowski v. Wellington Corporation* [1959] A.C. 53, 66.

⁴⁵ *Perkowski v. Wellington Corporation* [1959] A.C. 53.

⁴⁶ *Perkowski v. Wellington Corporation* [1959] A.C. 53 (diving-board over shallow water).

Secondly, the occupier is liable if he or his servants do any positive act of negligent misfeasance by which the licensee suffers harm, as by negligently driving over a person who has been permitted to use a private way. The licence is granted subject to existing dangers, but no further act must be done by the grantor or his servants to endanger the safety of the person to whom it was given.⁴⁷ But if injury has been caused by the act of an independent third party which has no reference to the state of the premises the occupier is not liable,⁴⁸ although the third party himself may be on the ordinary principles of negligence.⁴⁹

Thirdly, the position of a licensee must be distinguished from that of a person for whom the occupier has undertaken, even though gratuitously, to perform some service: for example, a gratuitous contract of carriage.⁵⁰ Such a contract imposes a duty of reasonable care in the performance of it, and this duty extends to ascertaining the safe condition of the premises on which the contract is to be performed. "The distinction made by Sir John Salmond between the measure of the duty owed to one who is a licensee and nothing more and to one who is a licensee for whom some service has been undertaken is, we think, entirely sound in principle."⁵¹ So he who lends his motor-car to a friend is not bound to ascertain its safe condition⁵²; but he who takes his friend for a drive apparently is so bound.

Test of knowledge is objective

The licensor is only bound to warn the licensee of traps of which he actually knows. The plaintiff is not, however, required to undertake the burden of showing that the occupier realised that facts of whose existence he was fully aware constituted a danger, for this would indeed be to favour the stupid or incompetent occupier at the expense of his more prudent and civilised

⁴⁷ The preceding two sentences were cited with approval by Jenkins L.J. in *Ashdown v. Williams (Samuel) & Sons, Ltd.* [1957] 1 Q.B. 409, 421. Liability for "current operations" is further considered above, § 105.

⁴⁸ *Waring v. East Anglian Flying Services, Ltd.* [1951] W.N. 55.

⁴⁹ As in *Billings v. A. C. Riden & Co., Ltd.* [1958] A.C. 240. In such a case it is irrelevant to consider the plaintiff's status with respect to the occupier: see further, below, § 114.

⁵⁰ Or a contract to bring the licensee on a guided tour of industrial premises: *Heard v. N.Z. Forest Products, Ltd.* [1960] N.Z.L.R. 329.

⁵¹ *Heard v. N.Z. Forest Products, Ltd.* [1960] N.Z.L.R. 329, at 363, *per* North and Cleary J.J. See also *Haseldine v. C. A. Daw & Sons, Ltd.* [1941] 2 K.B. 343, 373; *Paton, Bailment*, pp. 140-143.

⁵² See below, § 117.

neighbour. "The licensor is not liable if, through lack of adequate inspection he failed to ascertain the existence of the physical facts which constitute the danger. But if the licensor does know of the physical facts which constitute the danger, and a reasonable man, having that knowledge, would appreciate the risk involved, the licensor is not excused by his own failure to appreciate the risk involved."⁵³

This is also the explanation of certain remarks of Lord Atkinson and Lord Wrenbury in *Fairman's case*,⁵⁴ and Lord Hailsham L.C. in *Addie v. Dumbreck*,⁵⁵ to the effect that the occupier's liability extended to dangers of which he ought to have known. It is true that in five cases in the Court of Appeal it was said that these statements were made *per incuriam*,⁵⁶ and in one that they were *obiter dicta*,⁵⁷ but the explanation given above is preferable.

There are a number of other cases before the Act of 1957 in which the requirement of actual knowledge was interpreted in a rather elaborate and unexpected way. Their effect was thus summarised in *Pearson v. Lambeth Borough Council* ⁵⁸:

"They seem to decide: (1) that to have 'actual knowledge of the danger' the defendant or his servants need not know of the actual presence on the premises at the time of the accident of the physical object which, in the result, causes the injury. It is enough if such an object has been there in the past and a similar object may be there again if no sufficient precautions have been taken to prevent its presence: *Ellis v. Fulham Borough Council*.⁵⁹ Also (2)

⁵³ *Hawkins v. Coulsdon and Purley U.D.C.* [1953] 1 W.L.R. 882, at 893, *per Pearson J.*; affirmed, [1954] 1 Q.B. 319. (The plaintiff in this case was the wife of Master Hawkins of the Ch. Div., himself a former member of the defendant U.D.C.) See, too, *Greene v. Chelsea B.C.* [1954] 2 Q.B. 127; *Stewart v. Glasgow Corporation*, 1958 S.C. 28.

⁵⁴ [1923] A.C. 74, 86, 96.

⁵⁵ [1929] A.C. 358, 365.

⁵⁶ *Coates v. Rawtenstall Corpn.* [1937] 3 All E.R. 602; *Ellis v. Fulham B.C.* [1938] 1 K.B. 212, 221; *Haseldine v. Daw* [1941] 2 K.B. 343, 372; *Sutton v. Bootle Corpn.* [1947] K.B. 359, 365-366; *Pearson v. Lambeth B.C.* [1950] 2 K.B. 353.

⁵⁷ *Pearson v. Lambeth B.C.* [1950] 2 K.B. 353, 361.

⁵⁸ [1950] 2 K.B. 353, at 364, *per Asquith L.J.*

⁵⁹ [1938] 1 K.B. 212. But a licensor is not obliged "to consider all the possible ways in which unauthorised people might bring his best endeavours to naught"—*Rochman v. Hall* [1947] 1 All E.R. 895, 897, *per Birkett J.*

(and more relevant to the present case) that it is sufficient if the defendant knows (a) that there is present a physical object capable of being put in a dangerous condition; (b) by the action of third persons; (c) who are quite likely to act in such a way as to put it in a dangerous condition having regard to their past behaviour or inherent qualities: *Coates v. Rawtenstall Corporation*.⁶⁰

These cases came very near to deciding that the actual knowledge which the licensor must be shown to possess is the knowledge which a reasonable man in the occupier's position probably would have had. Yet so to hold would be "to depart from principle, principle which, before the present chaos overtook the law of torts, was regarded as settled."⁶¹

(3) Duty under the Occupiers' Liability Act

An occupier of premises⁶² owes the common duty of care to a visitor who would at common law have been treated as his licensee—i.e., he must take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is permitted by the occupier to be there. It follows that the provisions of the statute relating to the visitor's knowledge of the danger, or the employment by the occupier of an independent contractor are applicable here also. It should be remembered that the occupier may extend, restrict, modify or exclude his duty by agreement or otherwise, in so far as he is free to do so.⁶³

§ 111. Lawful Visitors: (4) Persons Entering as of Right⁶⁴

Persons entering as of right but not in pursuance of any contract between the parties are not a separate category: they are

⁶⁰ [1937] 3 All E.R. 602. Cf. *Sutton v. Buttle Corporation* [1947] K.B. 359, where actual knowledge not proved. It will be noted that these cases all concern the acts of third parties in putting the premises into a defective state, and not to acts of negligent misfeasance which have no relation to the physical state of the premises.

⁶¹ *Aiken v. Kingborough Corporation* (1939) 62 C.L.R. 179, at 208, per Dixon J.

⁶² As defined above, § 104.

⁶³ See above, § 107.

⁶⁴ See Paton, "The Liability of an Occupier to Those Who Enter as of Right," (1941) 19 Can.Bar Rev. 1; Prosser, "Business Visitors and

either invitees or licensees. But in truth there are at least two distinct classes of such persons: (1) officials or others who in the exercise of a legal power or duty enter premises; (2) members of the public, who, as such, exercise their rights of using land or premises dedicated to public use such as highways, recreation grounds, lavatories, libraries, museums, and so forth.

(1) Persons entering in exercise of a power or duty

Modern statutes have vastly increased the numbers of those authorised to enter premises (whether public or private) for some official purpose: thus, to take only a few examples, there are powers of entry and inspection under the Factories Act, 1961, the Rights of Entry (Gas and Electricity Boards) Act, 1954, and the Atomic Energy and Radioactive Substances Acts, 1946 to 1959.⁶⁵ The position of such persons at common law was not entirely clear, but the balance of opinion was in favour of treating them as invitees and not as licensees,⁶⁶ even though their right to enter by no means depended on any invitation issued by the occupier.⁶⁷ But now section 2 (6) of the Occupiers' Liability Act, provides that persons who enter premises for any purpose in the exercise of a right conferred by law⁶⁸ are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not. They will, therefore, be entitled to the benefit of the common duty of care which the occupier now owes to all lawful visitors—namely, to

Invitees," *Topics*, Chap. 5; Wallis-Jones, "Liability of Public Authorities as Occupiers of Dangerous Premises," (1949) 65 L.Q.R. 367; Waters, "Public Rights of Entry" [1958] C.L.P. 182.

⁶⁵ It was stated in June, 1952, by the Chancellor of the Exchequer that 6,128 persons had powers of entry and inspection over private premises. For a table of the titles, duties, and responsible ministers of 3,887 persons entitled to enter private premises without a specific search warrant, see 178 H.L. Deb. 5s, col. 176 (July 23, 1952). A person who exceeds his statutory or common law power of entry is a trespasser and may be dealt with accordingly: *Darling v. Att.-Gen.* [1950] 2 All E.R. 793; *Stroud v. Bradbury* [1952] 2 All E.R. 76.

⁶⁶ *Fryer v. Salford Corporation* [1937] 1 All E.R. 617, 622; *Read v. J. Lyons & Co., Ltd.* [1947] A.C. 156 (factory inspector); *Hartley v. Mayoh & Co., Ltd.* [1954] 1 Q.B. 383 (fireman). This was the opinion of the Law Reform Committee: 3rd Report, ss. 37-38. But see *M'Phail v. Lanarkshire C. C.*, 1951 S.C. 801. Sometimes the issue of the plaintiff's status was disregarded and the case decided according to the general principles of negligence: Wallis-Jones, 65 L.Q.R. 368.

⁶⁷ *Aiken v. Kingborough Corporation* (1939) 62 C.L.R. 179, 190.

⁶⁸ With the exception of those entering by virtue of an access agreement or order under the National Parks and Access to the Countryside Act, 1949.

take reasonable care to see that the premises are reasonably safe for the purpose in hand.⁶⁹

(2) Persons entering on public premises

Those who make use of premises such as public libraries and recreation grounds appear to be in a different category, for the occupier in such a case is normally a public authority empowered but not obliged by statute to devote its premises to the purpose in question for the general benefit of society, whose members in turn are entitled but not in general specifically empowered or obliged to use the premises. At common law the balance of authority was in favour of treating such persons as licensees,⁷⁰ although there were weighty arguments in favour of regarding them as invitees.⁷¹ The terms of section 2 (6) of the Occupiers' Liability Act, which have been set out in the previous paragraph, appear to place persons entering on public premises into the category of licensees. As such they are owed the common duty of care, the nature of which has already been explained.⁷²

Passengers on a highway

Passengers on a highway across land in private ownership stand in a class apart. Apart from statutory modifications of the common law, a highway is merely a public right of way over land which remains in the occupation of the owner of that land. It is well established that such an occupier is under no responsibility as such towards users of the highway for its safety and is not liable for dangers thereon whether they exist at the time of dedication or come into existence later. The occupier is liable, of course, for acts of positive misfeasance whereby he obstructs the highway or renders it dangerous, and he is also liable for

⁶⁹ See above, § 107.

⁷⁰ So the Court of Appeal in *Sutton v. Bootle Corporation* [1947] K.B. 359 (recreation ground), and *Pearson v. Lambeth B.C.* [1950] 2 K.B. 353 (lavatory), felt obliged by the previous decisions to hold that the entrant in each case was only a licensee of the occupier. But in *Plank v. Stirling Magistrates*, 1956 S.C. 92, the Court of Session, after a full review of the authorities, came to the conclusion that they had been misinterpreted by the Court of Appeal, and that a child in a public playground was an invitee. *Contra*, *Spittal v. Wellington Corporation* [1959] N.Z.L.R. 1095. A person entering a place of public worship has also been held to be a licensee: *Kirwan v. Representative Church Body* [1959] I.R. 215.

⁷¹ *Pearson v. Lambeth B.C.* [1950] 2 K.B. 353, 367.

⁷² See above, § 107.

maintaining his adjoining premises in such a dangerous condition as to constitute a nuisance to the highway.⁷³ The liability in the case of a private right of way as between the grantor and the grantee appears to be similar. Although the words of section 2 (6) of the Occupiers' Liability Act seem to be wide enough to convert such users of a public or private right of way into licensees, it is probable that the old law remains unaltered.⁷⁴

§ 112. Duty to Trespassers⁷⁵

Hitherto we have confined our attention to the rights of persons who lawfully enter on dangerous premises and there come to harm. We have now to deal with the position of mere trespassers. The law on this point has not been affected by the Occupiers' Liability Act.

(1) Who are trespassers

The word "trespasser" has an ugly sound, but all sorts of comparatively innocent and respectable persons are in law trespassers,⁷⁶ such as a walker in the countryside who unhindered strolls across an open field.⁷⁷ A trespasser has been defined as one "who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor, or, if known, is practically objected to."⁷⁸ But it is sometimes difficult to distinguish between a trespasser and a person entering lawfully by the tacit permission of the occupier.⁷⁹ Thus the occupier tacitly invites and permits certain classes of persons to enter his garden gate and come to the door. If his dog bites a person so entering,

⁷³ This sentence was cited with approval by Atkinson J. in *Wringe v. Cohen* [1940] 1 K.B. 229, 241.

⁷⁴ The Law Reform Committee (para. 33) expressly refused to recommend any change, and Hylton-Foster, S.-G., assured Standing Committee A of the House of Commons that in this respect the Act carried out the recommendations of the Law Reform Committee (March 26, 1957, col. 5).

⁷⁵ Hart, "Injuries to Trespassers" (1931) 47 L.Q.R. 92; Hughes, "Duties to Trespassers" (1959) 68 Yale L.J. 633; Goodhart, "An Infant Trespasser on Railway Lines" (1963) 79 L.Q.R. 586; *ibid.* "An Adult Trespasser on the Railway Lines" (1964) 80 L.Q.R. 559.

⁷⁶ *Hlott v. Wilkes* (1820) 3 B. & Ald. 304, 312.

⁷⁷ *Commissioner for Railways v. Cardy* (1961) 104 C.L.R. 274, 319.

⁷⁸ *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck* [1929] A.C. 358, 371, *per* Lord Dunedin.

⁷⁹ Yet MacKinnon L.J. said in *Ellis v. Fulham B.C.* [1938] 1 K.B. 212 at 238, "We all know what trespassers are, and that category is clear."

liability will depend on whether that person falls within the class of persons so tacitly invited; for otherwise he is a mere trespasser to whom no duty is owing. Who, then, are thus entitled to enter, and to complain of injuries received? What shall be said, for example, of hawkers, beggars, tract distributors, canvassers,⁸⁰ or persons in a shop who are not genuine purchasers but "hostile or at any rate competitive observers"?⁸¹ The only acceptable conclusion would seem to be that no person is to be accounted a trespasser who enters in order to hold any manner of communication with the occupier or any other person on the premises, unless he knows or ought to know that his entry is prohibited.⁸² Moreover, as we have seen,⁸³ the acquiescence of the occupier in habitual trespasses may be evidence of tacit leave and licence, so as to transform the trespasser into a licensee.⁸⁴

(2) Scope of the duty

It is now clear, after some hesitation, that it is immaterial whether the trespasser is a burglar, a lost traveller, or a child: each is owed precisely the same duty by the occupier.⁸⁵

The general principle is that he who enters wrongfully enters at his own risk in all respects. A burglar who breaks his leg by falling down the stairs cannot complain that they were insecure, nor can a beggar recover damages because he is bitten by the dog.⁸⁶

It has been emphatically stated by the Judicial Committee,⁸⁷

⁸⁰ See *Dunster v. Abbott* [1954] 1 W.L.R. 58.

⁸¹ *Chaytor v. London, etc., Fashion, Ltd.* (1961) 30 D.L.R. (2d) 527, 534.

⁸² This passage was cited by Cooke J. in *Christian v. Johannesson* [1956] N.Z.L.R. 664, 666. In *Great Central Ry. v. Bates* [1921] 3 K.B. 578, a constable on duty, seeing one of the sliding doors of the defendant's warehouse open, went in at night "to see that everything was right inside," and fell into a sawpit. It was held that the constable was a trespasser. See also *Davis v. Lisle* [1936] 2 K.B. 434, and unreported cases cited in Fieldsend, "Civil Actions by and against Police Officers" (1956) 29 *Police Journal* 70. He would not, however, seem to have been a trespasser on the principle stated in the text. The alternative ground for the decision is to be preferred that even if he was a licensee the defendants did not know the likelihood of his entry, and therefore had not knowingly exposed him to a trap.

⁸³ Above, § 110.

⁸⁴ This sentence was cited by Fullager J. in *Rich v. Commissioner for Railways (N.S.W.)* (1959) 101 C.L.R. 135, at 143, and by Viscount Radcliffe in *Commissioner for Railways v. Quinlan* [1964] A.C. 1054, 1062.

⁸⁵ *Commissioner for Railways v. Quinlan* [1964] A.C. 1054.

⁸⁶ *Sarch v. Blackburn* (1830) 4 C. & P. 297.

⁸⁷ *Commissioner for Railways v. Quinlan* [1964] A.C. 1054.

affirming many older English decisions, that the occupier of property owes no duty⁸⁸ to a trespasser other than that of not inflicting damage intentionally or recklessly on a trespasser known to be present. The Judicial Committee expressly disapproved some attempts to liberalise the law which had found favour with the Court of Appeal.⁸⁹ Those attempts had two aspects, general and particular. In general, it was said that the immunity enjoyed by an occupier had become obsolete since the general duty to take reasonable care to avoid foreseeable damage introduced by *Donoghue v. Stevenson*.⁹⁰ This argument was expressly disapproved in *Quinlan's Case*.⁹¹ In particular, it was said that the general principle of immunity was inapplicable if the occupier could be sued in some capacity other than that of occupier. For the general principle is concerned only with the incidents which the law attaches to the specific relation of occupier and trespasser and covers only cases in which the breach of duty of which the plaintiff complains arises out of the defendant's occupation or control of property, of "premises" or a "structure." There are, however, cases in which the occupier, in addition to being an occupier, stands in some other relation to a trespasser, so that the latter is not only a trespasser but is also the occupier's neighbour within the familiar principle expounded by Lord Atkin.⁹² (The duties owed by a non-occupier to a trespasser are considered in fuller detail elsewhere.⁹³)

In *Quinlan's Case*⁹⁴ the Judicial Committee was less hostile to this argument. Although it stated that the distinction between the static condition of premises and the activities carried on

⁸⁸ It is, however, actionable to have on one's premises any excavation or other danger so close to the adjoining highway as to interfere with the safety of passengers, even though mischief cannot happen to them except by accidental deviation from the highway and resulting trespass on the defendant's land: *Barnes v. Ward* (1850) 9 C.B. 392; *Jacobs v. L. C. C.* [1950] A.C. 361, 376. It is also an actionable wrong to place anything on one's land for the purpose of attracting and injuring the animals of the adjoining occupier: *Townsend v. Wathen* (1808) 9 East 277.

⁸⁹ *Videan v. B.T.C.* [1963] 2 Q.B. 650.

⁹⁰ [1932] A.C. 560.

⁹¹ [1964] A.C. 1054, 1070.

⁹² In *Commissioner for Railways v. Cardy* (1961) 104 C.L.R. 274, at 297, Fullagar J. cited with approval the two preceding sentences, saying that they stated "the only view which is capable of putting all the decisions on a satisfactory basis."

⁹³ See below, § 114.

⁹⁴ [1964] A.C. 1054.

upon them was an unjustifiable refinement,⁹⁵ it also conceded that the relationship of occupier and trespasser might be displaced by some other relationship in a proper case.⁹⁶ Unfortunately it did not itself offer any description or definition of the circumstances in which such a displacement might occur, so the question can be solved only by the evolution of case-law.

Now we must consider the undoubted exception which the Judicial Committee did recognise—that of intentional or reckless harm to a trespasser known to be present.

(i) *Intentional harm to trespassers*

An occupier who intentionally harms a trespasser known to be present by creating on his premises a source of danger for that purpose is liable for the harm so done, unless the danger so created by him can be justified as being nothing more than a reasonable and therefore lawful measure of self-defence.⁹⁷ “A trespasser is liable to an action for the injury which he does; but he does not forfeit his right of action for an injury sustained.”⁹⁸ An occupier must not run a trespasser down with a roto-scythe,⁹⁹ or set a spring gun, “for that is just to arrange to shoot him without personally firing the shot.”¹ Thus in *Bird v. Holbrook*² the defendant placed a spring gun in his garden to protect it from the depredations of trespassers. The plaintiff was a boy who, in ignorance of the fact that any such danger existed, trespassed in the garden in order to recapture a fowl which had strayed there. While so trespassing he was injured by the discharge of the gun, and he was held to have a good cause of action. In the earlier case of *Ilott v. Wilkes*³ the facts were identical, except that the plaintiff

⁹⁵ [1964] A.C. at 1075.

⁹⁶ [1964] A.C. at 1081–1084.

⁹⁷ See Bohlen and Burns, “The Privilege to Protect Property by Dangerous Barriers and Mechanical Devices” (1926) 35 Yale L.J. 527.

⁹⁸ *Barnes v. Ward* (1850) 9 C.B. 392, at 420, per Maule J. Cf. *Young v. Edward Box, Ltd.* [1951] 1 T.L.R. 789, 793.

⁹⁹ *Westwood v. Hardy*, *The Times*, June 26, 1964.

¹ *Addie v. Dumbreck* [1929] A.C. 358, at 376, per Lord Dunedin.

² (1828) 4 Bing. 628. At the date when the cause of action arose it was not a criminal offence to set a spring gun, as it is now under the Offences against the Person Act, 1861, s. 31, re-enacting the Spring Guns Act, 1826.

³ (1820) 3 B. & Ald. 304, “a case which excited great attention both in Westminster Hall and beyond it”: *Lynch v. Nurdin* (1841) 1 Q.B. 29, at 36, per Denman C.J. The decision was criticised by Stallybrass, 11th ed., p. 584. But it was accepted as correct by Pollock (*Torts*, p. 116),

knew of the existence of the danger, and it was held that this knowledge prevented him from having any remedy.

But deterrence permissible. If, however, the source of danger intentionally created on the defendant's property is nothing more than a reasonably necessary means of protecting that property from trespass, he is under no liability for injury so suffered by a trespasser. "That you may set traps for trespassers is obvious."⁴ Although it is not lawful to defend one's land by means of a spring gun or a mine of dynamite, it is lawful to protect it by means of spikes or broken glass upon the top of a wall,⁵ or by a barbed-wire fence, or by a dog accustomed to bite mankind,⁶ unless, perhaps, the dog is so savage and so powerful as to be likely to cause serious bodily harm. Whether such lawful dangers are known to the trespasser or not, he has no cause of action for injuries which he receives from them. The distinction seems to be that an occupier is entitled to create dangers whose sole purpose is to emphasise that his property is private, the object being not primarily to injure trespassers, but to show that it is not worth while trespassing. These have been called "deterrent" dangers. But he is not entitled to create "retributive" dangers, i.e., dangers created for the purpose of injuring trespassers, which are not obvious but concealed, especially if hidden within the boundaries of his property. Only that amount of injury produced by a retributive danger is lawful, which could be justified by the occupier had he done it personally and directly to the trespasser.⁷

Knowledge. It is strongly emphasised in *Quinlan's case*⁸ that actual personal knowledge of the trespasser's presence is a

Holdsworth (H.E.L., xiii, p. 526), and Asquith J. (*Dann v. Hamilton* [1939] 1 K.B. 509, 516). See also the comments in Pound, "The Economic Interpretation and the Law of Torts" (1940) 53 Harv.L.Rev. 365, 372; Evatt, "Judges and Teachers of Public Law," *ibid.*, 1151.

⁴ *The Carlgarth* [1927] P. 93, at 109, *per* Scrutton L.J.

⁵ *Deane v. Clayton* (1817) 7 Taunt. 489, 521.

⁶ *Sarch v. Blackburn* (1830) 4 C. & P. 297, 300. (Note that in this case there was a warning notice, but as the plaintiff was unable to read he was held not to be affected by it: *Sycamore v. Ley* (1932) 147 L.T. 342, 344).

⁷ See Hart, "Injuries to Trespassers" (1931) 47 L.Q.R. 92. But see the criticism of Holdsworth, H.E.L., xiii, p. 526. The same rule applies to the trespasses of animals: *Jordin v. Crump* (1841) 8 M. & W. 762.

⁸ [1964] A.C. 1054.

condition precedent to liability. There is no obligation to take precautions in advance against injury to a trespasser whose presence is only possible or likely. But there may be cases where the occupier "as good as" knows of the trespasser's presence. Mere likelihood of presence is not enough: it must be "extremely likely."⁹ This is best illustrated by a series of cases dealing with harm recklessly caused to trespassers.

(ii) *Reckless disregard of trespassers*

A second qualification is that the occupier is liable even to a trespasser for positive acts of negligent misfeasance done by himself with knowledge of the trespasser's presence.¹⁰ An occupier of land owes a duty of care not only to persons lawfully there, but also to trespassers whom he knows to be there, or whose presence he recklessly disregards.¹¹ Thus in *Mourton v. Poulter*¹² the defendant was a nurseryman who was felling an elm tree for the occupier of the land. Knowing that when the last root was cut the tree would fall within two minutes, he did not repeat the warnings which he had previously given to children to go away, and the tree fell and injured the plaintiff aged ten. It was held that though the plaintiff was a trespasser he could recover damages from the defendant. A man who "does something which makes a change in the condition of the land, as where he starts a wheel, fells a tree, or sets off a blast when he knows that people are standing near . . . owes a duty to these people even though they are trespassers to take care to give them warning."¹³

⁹ [1964] A.C. 1054 at 1077.

¹⁰ In *Commissioner for Railways v. Cardy* (1961) 104 C.L.R. 274, at 296, Fullagar J. cited this sentence and said that "so far as it goes, it is, I think, sound, but it does not, in my opinion, go far enough." The learned judge held that an occupier owes a duty even to a trespasser for an omission to take a reasonable precaution required by all the circumstances of the case. But the editor's caution appears to have been justified by the decision in *Quinlan*.

¹¹ *Petrie v. Rostrevor Owners* [1898] 2 I.R. 556; *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck* [1929] A.C. 358, 365; *Gilmour v. Belfast Harbour Commissioners* [1939] N.I. 114; *Hillen v. I.C.I. (Alkali), Ltd.* [1936] A.C. 65, 70; *Glasgow Corporation v. Muir* [1943] A.C. 448, 461-462; *Edwards v. Railway Executive* [1952] A.C. 737, 745-746, 747-748; *Law Reform Committee (3rd Rep.)*, s. 28.

¹² [1930] 2 K.B. 188, approved in *Commissioner for Railways v. Quinlan* [1964] A.C. 1054, 1076.

¹³ [1930] 2 K.B. 188, at 190, *per* Scrutton L.J. Note that the defendant was not the occupier.

Two difficult cases reconciled

This is the explanation of two decisions of the House of Lords which are not at first sight easily reconcilable. In *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck*¹⁴ a boy of four years was killed whilst playing on a wheel, part of a haulage system, in a field occupied by the defendants. The field was surrounded by a hedge which was quite inadequate to keep out the public and was habitually used by young children as a playground to the knowledge of the defendants' officials, who at times warned children out of the field. The wheel was not visible from the electric motor which set it in motion and the accident occurred owing to the wheel being set in motion by the defendants' servants without taking precautions to avoid accident to persons frequenting the wheel. It was held that the boy was a trespasser and that the defendants owed him no duty to protect him from injury. In *Excelsior Wire Rope Co. v. Callan*¹⁵ the facts were very similar, yet the defendants were held liable. But in *Excelsior* the machinery was only used about three times a week and the children were only warned off when the machine was going to be set in action. It was well known to the defendants that when the machine was going to start it was extremely likely that children would be there and, with the wire in motion, would be in grave danger. If the man who gave the signal to start the machinery had looked to see whether any child was playing with the rope he would have seen, without moving from his position, only about 20 yards away from the wheel, that the child who was injured had returned to the rope.¹⁶ This is the point of difference between the two cases.¹⁷ An alternative explanation is that the defendants in *Excelsior* were not occupiers of the land upon which the accident happened but merely had a licence to have their machinery on the land.¹⁸

¹⁴ [1929] A.C. 358.

¹⁵ [1930] A.C. 404. (An unreserved judgment delivered without hearing counsel for the respondent.)

¹⁶ (1930) 99 L.J.K.B. 380. This, which is the all-important fact (*Mourton v. Poulter* [1930] 2 K.B. 183, 190), does not appear in the report in [1930] A.C. 404.

¹⁷ *Commissioner for Railways v. Quinlan* [1964] A.C. 1054, 1076; Goodhart, 80 L.Q.R. 559, 572.

¹⁸ If so, the branch of the law which deals with the duties of occupiers to entrants on their premises was not strictly in issue. This was the view of Lords Warrington, Thankerton and Atkin but "emphatically not" of Lord Dunedin. It was also the explanation of the case preferred by Lord

result of operations of a highly hazardous character conducted by the occupier on his premises. Some decisions in Australia²⁷ and in England²⁸ have imposed liability in such circumstances, but their authority is doubtful as the reasoning on which they were based has been disapproved by the Judicial Committee.²⁹ In any event, this immunity from liability extends only to the physical state of the premises in the defendant's occupation. If the child is known to be present the occupier must not deliberately injure him or act with reckless disregard of his presence.³⁰ Other persons on the premises (e.g., the occupier's invitees, licensees, or even trespassers) are probably under an even higher duty. They must take reasonable care to prevent damage to children whose presence they can reasonably foresee.³¹

(2) Infant licensees

Where, however, an occupier habitually and knowingly acquiesces in the trespasses of children, these children cease to be trespassers and become licensees, and the occupier owes to them a certain duty of care and protection accordingly.³² In *Cooke v. Midland Great Western Railway of Ireland*³³ the plaintiff was a child between four and five years of age who was injured while playing with his companions on a turntable on the defendant company's railway premises. The turntable was kept unlocked and was close to a public road. The company's servants knew that children were in the habit of entering on the premises from the road for the purpose of playing with the turntable but no precautions were taken by the company, either to exclude the children or to lock the turntable, so as to prevent it from being an instrument of mischief.³⁴ It was held by the House of Lords that there was evidence for a jury of actionable negligence on the part of the railway company—not

²⁷ *Commissioner for Railways v. Cardy* (1961) 104 C.L.R. 274.

²⁸ See the cases reviewed in *Videan v. B.T.C.* [1968] 2 Q.B. 560.

²⁹ *Commissioner for Railways v. Quinlan* [1964] A.C. 1054. Note that the J.C. expressly approved the decision as distinct from the reasoning in *Cardy*.

³⁰ *Mourton v. Poulter* [1930] 2 K.B. 183.

³¹ *Buckland v. Guildford, etc., Co.* [1948] 2 All E.R. 1086.

³² This sentence was cited with approval by MacKinnon L.J. in *Adams v. Naylor* [1944] K.B. 750, at 761.

³³ [1909] A.C. 229.

³⁴ The turntable is still in existence: when seen by the present editor in 1953 at least half-a-dozen children were playing on it.

on the ground that there is any duty of care towards trespassing children, but on the ground that the habitual acquiescence of the company was sufficient evidence that the plaintiff was not a trespasser, but was on the railway premises with the leave and licence of the company.³⁵ But in these cases the onus is on the plaintiff to establish his licence, and "to find a licence there must be evidence either of express permission or that the landowner has so conducted himself that he cannot be heard to say that he did not give it."³⁶ We have seen that a real acquiescence or permission must be shown: tolerance is not acquiescence though it may be evidence of it.³⁷ Nor may a licence be inferred merely because every possible step to keep out intruders has not been taken: a landowner is under no obligation at common law to fence his property against trespassers or to put up warning notices, however attractive his premises may be to trespassers.³⁸ Our law does not recognise the existence of a class of persons who, though not licensees, must be effectively prevented from becoming trespassers.³⁹

³⁵ See the explanation of *Cooke's* case in *Jenkins v. Gt. W. Ry.* [1912] 1 K.B. 526; *Corporation of Glasgow v. Taylor* [1922] 1 A.C. 44; *Addie v. Dumbreck* [1929] A.C. 358; *Liddle v. Yorkshire C.C.* [1934] 2 K.B. 101; *Edwards v. Railway Executive* [1952] A.C. 737. Beven attacked the decision in *Cooke's* case with great vigour: his description of the infant plaintiff as one of "a rabble of Irish ragamuffin raiders" moved Mr. Byrne, the editor of the 4th edition of his work, to protest that "the child—whom the editor chanced to see while the case was in the Irish courts—was the quite presentable little son of a respectable chemist" (p. 216). As Winfield said (*Tort*, p. 302), some of the criticism of *Cooke's* case has ignored the fact that while the H.L. held there was sufficient evidence to go to the jury they did not indicate that they would have reached the same conclusion as the jury did.

³⁶ *Edwards v. Railway Executive* [1952] A.C. 737, at 747, per Lord Goddard C.J. If a statute makes it a criminal offence to trespass on premises it may be that such permission can never be lawfully given: *Reardon v. Att.-Gen.* [1954] N.Z.L.R. 978; see also above, § 110. For how far knowledge of responsible subordinates can be imputed to the landowner himself, see *Matheson v. Att.-Gen.* [1956] N.Z.L.R. 849.

³⁷ Above, § 110.

³⁸ *Adams v. Naylor* [1944] K.B. 750. When the Occupiers' Liability Bill was in Committee a clause which would have had the effect of putting on the occupier the onus of showing that he had taken reasonable steps to prevent trespass by children under eleven years of age was rejected: Standing Committee A, March 26, 1957, col. 5. Even if there is a statutory duty to fence (as under the Railways Clauses Consolidation Act, 1845, s. 68) the duty is no more than to keep the premises shut off by a fence which is duly repaired when broken and obviously intended to keep intruders out: *Edwards v. Railway Executive* [1952] A.C. 737, 744.

³⁹ *Adams v. Naylor* [1944] K.B. 750, 765. This is particularly important if the plaintiff is a child: for "children, small boys especially, resemble

"Traps" and "allurements"

Is the principle that the only duty owed to a lawful visitor is the common duty of care applicable without modification to the case of children? As to this, there are the following observations to be made:

(i) *Children naturally less careful than adults.* "The principle . . . must in any given case be applied with a reasonable regard to the physical powers and mental faculties which the owner, at the time he gave the licence, knew or ought to have known the licensee possessed. To the blind the most obvious danger may be a trap. To the idiotic the most perilous act may appear safe and cautious."⁴⁰ Hence, in relation to children who are licensees, although an occupier is not bound to make his premises as safe as a nursery, most of the articles on which children come to grief are not such as are commonly found in nurseries, and this is to be borne in mind in considering whether they amount to a trap. The Occupiers' Liability Act, s. 2 (3), now provides that in assessing the common duty of care an occupier must be prepared for children to be less careful than adults. Many dangers which would be open and obvious to the adult may be concealed and secret traps for the child.⁴¹

"In the case of an infant, there are moral as well as physical traps. There may accordingly be a duty towards infants not merely not to dig pitfalls for them, but not to lead them into temptation."⁴² The defendant will be liable if the child has been lured into a trap.⁴³ "While it is very plain that temptation is not invitation, it may be held that knowingly to establish and

burglars; if they want to get in they will, take what precautions you may": *Edwards' Case* [1952] A.C., at 747, *per* Lord Goddard C.J.

⁴⁰ *Cooke v. Midland G. W. Ry.* [1909] A.C. 229, at 238, *per* Lord Atkinson.

⁴¹ *Williams v. Cardiff Corpn.* [1950] 1 K.B. 514 (a grassy slope with tins and broken glass at the bottom is a trap to a child of 4½ years).

⁴² *Latham v. Johnson* [1913] 1 K.B. 398, at 415, *per* Hamilton L.J.

⁴³ It is better not to use "allurement" to signify the circumstances under which a child enters premises: it remains a trespasser, however natural it may have been for it to enter. But once it has entered with permission it may find on the premises some attractive object which tempts it to meddle when it ought to abstain. This is an "allurement": a "trap" is something defective in the state of the premises themselves: see *Latham v. Johnson (R.) & Nephew, Ltd.* [1913] 1 K.B. 398, 415-416; *Addie (R.) & Sons (Collieries) v. Dumbreck* [1929] A.C. 358, 376; *Williams v. Cardiff Corporation* [1950] 1 K.B. 514; *Edwards v. Railway Executive* [1952] A.C. 747. But see *Windeyer J. in Commissioner for Railways v. Cardy* (1961) 104 C.L.R. 274, 321.

expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult.”⁴⁴ It is a question of law whether a given object can be a trap in the double sense of being fascinating and fatal⁴⁵: the mere fact that a child has been lured or tempted into disaster is not enough, for a child can hurt itself on anything. No exhaustive catalogue of “allurements” has been established. “Turntables, escalators and paddling pools have been held to ‘allure.’ Rivers, ponds and piles of paving stones have been held ‘insufficiently seductive.’”⁴⁶ So for obvious dangers, such as unguarded water (natural or artificial), an occupier will not be liable.⁴⁷

(ii) *Very young children.* The statement that an occupier is not liable for obvious dangers must be read subject to some qualification if the infant licensee is so young that it cannot really take care of itself at all. There is nothing upon which a toddler cannot hurt itself: the danger may be obvious to its eye but concealed from its understanding.⁴⁸ In *Phipps v. Rochester Corporation*⁴⁹ Devlin J. was able to formulate a “duty so as to compromise between the robustness that would make children take the world as they found it and the tenderness which would give them nurseries wherever they go.”⁵⁰ One October evening Ian Phipps, aged five, went out blackberrying with his sister, Yvonne, aged seven. They crossed over an open space on a building site of the defendants and there Ian fell into an open trench and broke his leg. He fell because he was not old enough to negotiate such an obstacle without assistance and Yvonne was not old enough to give it to him. The children had an implied licence to be where they were. Devlin J. held that although a

⁴⁴ *Per* Holmes J. in *United Zinc and Chemical Co. v. Britt* (1922) 258 U.S. at 275, quoted by Scrutton L.J. in [1934] 2 K.B. at 110.

⁴⁵ *Latham v. Johnson (R.) & Nephew Ltd.* [1913] 1 K.B. 398, 411.

⁴⁶ *Sutton v. Bootle Corporation* [1947] K.B. 359, at 368, *per* Asquith L.J. *Cf. Dyer v. Ilfracombe U.D.C.* [1956] 1 W.L.R. 218 (chute in recreation ground in latter class).

⁴⁷ *Liddle v. Yorkshire (North Riding) County Council* [1934] 2 K.B. 101, 112; *Perry v. Thomas Wrigley, Ltd.* [1955] 1 W.L.R. 1164, 1168.

⁴⁸ *Phipps v. Rochester Corporation* [1955] 1 Q.B. 450.

⁴⁹ [1955] 1 Q.B. 450, approved by the Court of Appeal in *M'Gullie v. Butler*, unreported, (1959) C.A. 64A.

⁵⁰ [1955] 1 Q.B., at 459.

licensor who tacitly permits the public to use his land without discriminating between its members must assume that the public will include little children, as a general rule he will have discharged his duty towards them if the dangers which they encounter are only those which are obvious to a guardian or of which he has given a warning comprehensible by a guardian.⁵¹ In this case the defendants succeeded because in all the circumstances there was no reason to suppose that Ian's parents would allow him to wander unaccompanied by a proper guardian.

(iii) *Technical trespasses may be disregarded.* If a child has a licence, express or implied, to enter upon the premises of the defendant, he does not necessarily become a trespasser merely because he moves to a place or onto an object outside the strict limits of the licence.⁵² In *Gough v. National Coal Board*⁵³ Gerwyn Evan Gough, aged six-and-a-half years, entered on the defendants' unguarded colliery tramway under an implied licence. He stole a ride on some slowly moving trucks which the defendants knew to be an allurement to children; he fell off and was injured. The Court of Appeal held that the child, being a licensee, did not become a trespasser merely because he meddled with the very thing against which he should have been protected. A similar principle governs the liability of those who leave close to or in some public street or place an object which is likely to be attractive and dangerous to children. In such a case "the facts attract some category of the law of torts and some concept of duty transcending the special rules concerning the duties of occupiers to entrants."⁵⁴ So in *Lynch v. Nurdin*⁵⁵ (the origin of all the law on this topic), the defendant was

⁵¹ [1955] 1 Q.B. at 472. This general rule would not apply to a place where, to the knowledge of the licensor, little children are permitted by their parents to go unaccompanied in the reasonable belief that they will be safe, e.g., a recognised playground. An alternative approach was rejected by Devlin J., viz., that the licence to a young child is conditional on its being accompanied by a competent guardian. This approach has been adopted in some cases (e.g., *Bates v. Stone Parish Council* [1954] 1 W.L.R. 1249), but Devlin J.'s reasons for rejecting it seem conclusive.

⁵² The Judicial Committee in *Commissioner for Railways v. Quinlan* [1964] A.C. 1054 appear to recognise this exception.

⁵³ [1954] 1 Q.B. 191. See also *Glasgow Corporation v. Taylor* [1922] 1 A.C. 44 (child of seven eating poisonous berry in botanic garden).

⁵⁴ *Commissioner for Railways v. Cardy* (1960) 104 C.L.R. 274, at 321, per Windeyer J.

⁵⁵ (1841) 1 Q.B. 29.

held liable when his servant left a horse and cart unattended in Compton Street, Soho, for half-an-hour and the plaintiff (aged under seven years) "indulged the natural instincts of a child" by playing on the vehicle, from which he fell and was injured. "The most blameable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation."⁵⁶ A rotten fence,⁵⁷ a defective high-tension wire,⁵⁸ and a trailer,⁵⁹ have been held to be within this category, but not a pile of lime mortar.⁶⁰

§ 114. Liability of Non-Occupiers

It must not be supposed that the occupier of dangerous premises is the only person who can be responsible for dangers which there exist. Whoever actually creates a source of danger, even on premises not in his own occupation, is bound to use reasonable care by guiding, warning or otherwise, to preserve from resulting harm persons who enter thereon. The status which the entrant enjoys *vis-à-vis* the occupier is not conclusive of any issue which may arise as between the entrant and some other party whose activities on the premises have created a source of danger, although it may well be relevant in an assessment of the standard of care appropriate to the circumstances. Many cases may be found in which the fact that the injury has occurred on premises occupied by a third party has been treated as irrelevant. Thus in *Billings (A. C.) & Sons, Ltd. v. Riden*⁶¹ the House of Lords held that a contractor working on premises owes a duty to take reasonable care to prevent damage to persons whom he may reasonably expect to be affected by his work. The case is also, as we have seen,⁶² a leading authority on the question how far the plaintiff's knowledge of the danger so created will bar his claim entirely or merely be a ground for reduction of his damages under the Law Reform (Contributory Negligence) Act, 1945. "We are

⁵⁶ (1841) 1 Q.B. at 38, *per* Lord Denman C.J.

⁵⁷ *Harrold v. Watney* [1898] 2 Q.B. 320.

⁵⁸ *Thompson v. Bankstown Corporation* (1953) 87 C.L.R. 619.

⁵⁹ *Creed v. McGeoch & Sons, Ltd.* [1955] 1 W.L.R. 1005.

⁶⁰ *Prince v. Gregory* [1959] 1 W.L.R. 177.

⁶¹ [1958] A.C. 240.

⁶² See above, § 14.

concerned with the duty of care that is owed by a person doing work—or anything else—on land: and that duty is today best found by resort to the general principle enunciated by Lord Atkin in *Donoghue v. Stevenson*.⁶³ Such a person—be he occupier, contractor, or anyone else—owes a duty to all persons who are so closely and directly affected by his work that he ought reasonably to have them in contemplation when he is directing his mind to the task.”⁶⁴ A non-occupier does not necessarily discharge this duty simply by warning the visitor: he may be under a duty to make the premises safe.⁶⁵ So an invitee may recover against another invitee,⁶⁶ or a licensee against another licensee⁶⁷ on the broad ground that the defendant has failed to take such care as was reasonable in the circumstances.

Trespasser may sue

Even a trespasser may have a successful claim. In *Buckland v. Guildford Gas Light & Coke Co.*⁶⁸ an active schoolgirl of 18 years who climbed an attractive oak tree was electrocuted when she came into contact with the defendant's high-voltage electric wires, which were hidden in the foliage at the top. The defendants were held liable because they were in breach of their duty to take reasonable care for the safety of someone who might reasonably have been contemplated as likely to be affected by their want of care.⁶⁹ Normally a non-occupier will be entitled

⁶³ [1932] A.C. 562, 580. See above, § 80.

⁶⁴ *Miller v. South of Scotland Electricity Board*, 1958 S.C. 20, at 37, per Lord Denning.

⁶⁵ *Johnson v. Rea, Ltd.* [1962] 1 Q.B. 373.

⁶⁶ *Canter v. Gardner & Co., Ltd.* [1940] 1 All E.R. 325 (servant of the sub-contractor injured by another sub-contractor). So in *Cleghorn v. Oldham* (1927) 43 T.L.R. 465 the plaintiff was on a golf-links with her brother and the defendant (“as a chaperone” the report says) when she was struck by a club owing to the defendant's negligence. The plaintiff recovered on the broad ground of negligence. Cf. *Keegan v. Owens* [1958] I.R. 267; *Whitehorn v. Port of London Authority* [1955] 1 Lloyd's Rep. 54. Note that an invitee may owe a duty of reasonable care to his invitor: *Lomas v. Jones & Son* [1944] K.B. 4.

⁶⁷ *Corby v. Hill* (1858) 4 C.B.(N.S.) 556; *Waring v. East Anglian Flying Services, Ltd.* [1951] W.N. 55.

⁶⁸ [1948] 2 All E.R. 1086.

⁶⁹ Although this doctrine (insofar as it affords protection to a trespasser) may perhaps be traced back to *Latham v. Johnson (R.) and Nephew, Ltd.* [1913] 1 K.B. 394, the more recent cases are founded directly upon the neighbour principle of *Donoghue v. Stevenson*. It is hard to be enthusiastic about them. Why should the contractor whom I employ to dig a hole in my field

to assume that the premises will be free from trespassers, but on the facts of this case the defendant ought to have foreseen their presence. The fact that the girl might have been a trespasser *vis-à-vis* the owner of the tree did not automatically exclude the liability of the defendant, for the plaintiff was able to point to some source of obligation other than the relation which the trespass itself created.⁷⁰ But if repeated warnings are given which are clearly understood by the trespasser the defendant is probably not obliged to suspend his operations.⁷¹

§ 115. Liability of Lessor or Vendor of Premises

(1) Liability of landlord to tenant and others

Who is a lessor

It is important to distinguish between an occupier and a lessor: the former owes many duties, the latter very few. A lessor is usually one who transfers to another the exclusive occupation of premises for a definite period. If that other does not obtain exclusive possession, he is only a licensee.⁷² Hence the question has arisen whether an owner of premises can avoid his responsibilities by creating a lease of a few days, or even a few hours. There has naturally been a reluctance to permit him to do so, particularly if he is the owner of premises continually used for public purposes. This has been the approach in two Irish cases, in which the premises were "let" for a dance⁷³ and a whist drive.⁷⁴ These cases have been followed in Australia, although "there are some, not inconsiderable, differences between a whist drive and dance in Dublin and a meeting of tobacco growers in Texas, Queensland."⁷⁵

be liable when I am not? See *Kenny v. Electricity Supply Board* [1932] I.R. 73, 92; *Creed v. McGeoch & Sons, Ltd.* [1955] 1 W.L.R. 1005, 1008, and *Miller v. South of Scotland Electricity Board*, 1958 S.C. 20, 36.

⁷⁰ *Farrugia v. G. W. Ry.* [1947] 2 All E.R. 565; *Thompson v. Bankstown Corporation* (1953) 87 C.L.R. 619.

⁷¹ *Deyo v. Kingston Speedway, Ltd.* [1955] 1 D.L.R. 718.

⁷² See above, § 29.

⁷³ *Kelly v. Woolworth, Ltd.* [1922] 2 I.R. 5.

⁷⁴ *Boylan v. Dublin Corporation* [1949] I.R. 60.

⁷⁵ *Voli v. Inglewood Shire Council* (1963) 37 A.L.J.R. 25, at 30, *per* Windeyer J.

Duty of lessor

Apart from any express or implied contract⁷⁶ to that effect, a landlord owes no duty, either towards his tenant or towards any other person who enters on the premises during the tenancy, to take care that the premises are safe either at the commencement of the tenancy or during its continuance.⁷⁷ The rule was so laid down in *Robbins v. Jones*⁷⁸ by a strong court. Sir William Erle C.J., in a judgment prepared by Willes J., said: "A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents arising during the term; for, fraud apart, there is no law against letting a tumbledown house; and the tenant's remedy is upon his contract, if any." Even if the lessor has entered into an express covenant to repair there has to be read into such a covenant an implied condition that the lessor must have notice of the want of repair before his obligation arises.⁷⁹ It is probably sufficient if he has notice from any source: it need not be given by the lessee.⁸⁰

A good illustration of the general rule may be found in *Davis v. Foots*,⁸¹ in which the defendants let an unfurnished flat to the plaintiff, who was about to get married. Two days before the tenancy began the defendants' son left no tap on a pipe from which he had disconnected a gas-fire with the result that when the gas was turned on at the meter it escaped into the bedroom,

⁷⁶ See *Sleafer v. Lambeth B.C.* [1960] 1 Q.B. 48 (an obligation to repair will not be implied merely because the lessor has a right to enter to effect repairs).

⁷⁷ This sentence was cited with approval in *MacDonald v. Goderich* [1949] 3 D.L.R. 788, 793; and in *Collins v. Torresan* [1956] 3 D.L.R. 740, 743.

⁷⁸ (1863) 15 C.B. (n.s.) 221, 240. In *Cavalier v. Pope* [1906] A.C. 428, 430, Lord Macnaghten said the rule was "beyond question." See Glanville Williams, "The Duties of a Non-occupier in Respect of Dangerous Premises" (1942) 5 M.L.R. 194; Hamson, "Shirvell v. Hackwood Estates, Ltd." (1938) 2 M.L.R. 215; Walford, "Caveat Lessor?" (1947) 11 The Conveyancer 27; West, "Implied Obligations of a Landlord" (1961) 25 The Conveyancer 184; Carswell, "The Duty of Care of a Builder" (1961) 14 N.I.L.Q. 488.

⁷⁹ *Torrens v. Walker* [1906] 2 Ch. 186. *Quaere*, whether the lessor would be liable if he actually knew of the defect at the date when the term began: *Uniproducs (Manchester), Ltd. v. Rose Furnishers, Ltd.* [1956] 1 W.L.R. 45. But if the plaintiff is injured, not on the premises, but on the adjoining highway, he need not prove that the lessor had notice of the want of repair: see above § 27. There has been said to be no illogicality in this: *Mint v. Good* [1951] 1 K.B. 517, 525.

⁸⁰ Chapman, *Statutes*, p. 60.

⁸¹ [1940] 1 K.B. 116.

the plaintiff's husband died and she herself became very ill. But she had no remedy. Although this principle normally applies to the physical fitness of the premises it is equally applicable where the premises are, so to speak, legally unfit for the purpose required.⁸² The letting of a furnished house or of furnished apartments is, however, an exception to the general rule. Such an agreement contains an implied warranty that the premises are at the commencement of the tenancy fit for immediate occupation. If they are not so fit, the tenant may determine the tenancy or sue for damages in respect of any injury suffered.⁸³ But the letting of an unfurnished flat probably⁸⁴ falls within the general rule.⁸⁵

(2) Liability of landlord to third parties

The landlord's exemption from liability for dangers existing on premises in the occupation of his tenant extends not merely to injuries suffered by the tenant himself but to those suffered by other persons entering on the premises during the tenancy.⁸⁶ The lease transfers all obligations towards such persons from the landlord to the tenant. This was so even if the landlord has by contract with the tenant taken upon himself the duty of keeping the premises in repair. Such a contract was *res inter alios acta*, and conferred upon strangers no rights against the landlord which they would not have had without it.⁸⁷ This was clearly established in *Cavalier v. Pope*.⁸⁸ The landlord of a defective house contracted with the plaintiff's husband to repair it. Nothing was done and one day the plaintiff fell through the floor and was

⁸² *Edler v. Auerbach* [1949] 2 All E.R. 692 (no implied warranty that residential premises could lawfully be used for professional purposes).

⁸³ *Collins v. Hopkins* [1923] 2 K.B. 617 (house recently occupied by person suffering from pulmonary tuberculosis). This warranty does not extend to defects arising after the commencement of the tenancy: *Sarson v. Roberts* [1895] 2 Q.B. 395. Another exception is the implied warranties relating to houses of low rateable value established by s. 6 of the Housing Act, 1957. A lessor of defective premises may also be required to repair them by the local authority under the Housing Act, 1957, s. 9.

⁸⁴ See West, 25 *The Conveyancer*, 184.

⁸⁵ *Cruse v. Mount* [1933] Ch. 278; *Davis v. Foots* [1940] 1 K.B. 116.

⁸⁶ *Bromley v. Mercer* [1922] 2 K.B. 126; *Travers v. Gloucester Corporation* [1947] K.B. 71.

⁸⁷ The preceding sentences were cited with approval in *MacDonald v. Goderich* [1949] 8 D.L.R. 788, 793; and *Collins v. Torresan* [1956] 3 D.L.R. 740, 743.

⁸⁸ [1906] A.C. 428.

injured. A common jury awarded her £75 damages and her husband £25. The House of Lords set aside the award in favour of the plaintiff. "There was but one contract and that was made with the husband. The wife cannot sue upon it."⁸⁹ But the decision in *Cavalier v. Pope* has now been reversed by statute. The Occupiers' Liability Act, 1957, s. 4 (1), provides that when premises are occupied by any person under a tenancy⁹⁰ which puts on the landlord⁹¹ an obligation to that person for the maintenance or repair of the premises,⁹² the landlord shall owe to all persons who or whose goods may from time to time lawfully be on the premises the same duty, in respect of dangers arising from any default by him in carrying out that obligation, as if he were an occupier of the premises and those persons or their goods were there by his invitation or permission.

But builder may be liable. Although the immunity of the lessor or vendor of dangerous premises is a rock which has escaped the flood-tide of liability released by *Donoghue v. Stevenson*,⁹³ it is now clear that the builder of defective premises enjoys as such⁹⁴ no similar immunity, but owes a duty of reasonable care to the tenant or purchaser or his visitors.⁹⁵ The oft-repeated statement that "*Donoghue v. Stevenson* does not apply to realty" means only that the vendor or lessor of defective premises is immune.

(3) Liability for landlord's own premises

In all these cases the plaintiff has suffered damage while on the premises demised as a result of some defect in the condition

⁸⁹ *Per* Lord James of Hereford.

⁹⁰ This includes a statutory tenancy: s. 4 (7).

⁹¹ A corresponding obligation is placed on any superior landlord who has undertaken a similar repairing obligation to his own tenant and so on up any chain of landlords until the chain is broken by the existence of a landlord who is not under any such obligation: s. 4 (2).

⁹² It must be remembered that in the absence of an express covenant to repair (and notice of its breach) the landlord is under no such obligation. This rule is expressly recognised in s. 4 (4) of the Act. Hence the plaintiff in a case like *Travers v. Gloucester Corporation* [1947] K.B. 71 would still be without remedy. It is doubtful how far this rule could or should be changed as a result of *Donoghue v. Stevenson*: see Heuston, 20 M.L.R. 1.

⁹³ [1932] A.C. 562.

⁹⁴ If he carries out the work as a servant and not as an independent contractor he will be entitled to his principal's immunity.

⁹⁵ *Sharpe v. E. T. Sweeting & Son, Ltd.* [1963] 1 W.L.R. 665.

of those premises. We have also already considered the position when the plaintiff suffers damage while on premises retained by the lessor in his own occupation (*e.g.*, a common stairway).⁹⁶ But what is the position when, as a result of the defective condition of the portion of the premises retained in the landlord's occupation, the tenant or one of the tenant's invitees or licensees is injured while on the portion of the premises demised? In *Cheater v. Cater*⁹⁷ the Court of Appeal held that a landlord who let a part of his land overhung by yew trees growing upon the land retained by him was not responsible to his tenant⁹⁸ for the loss of cattle which were poisoned by eating the overhanging branches. This was carried further in *Shirvell v. Hackwood Estates Ltd.*,⁹⁹ in which a branch fell from a beech tree which the occupying owner of the land knew to be in a defective condition upon the servant of a tenant to whom he had leased the adjoining land. It was said that even if the defendant was negligent there was no liability: but it is probable that those statements were only *obiter dicta*.¹ In any case it seems clear that the principle laid down in these cases is confined to situations where the danger existed and was apparent at the date of the demise.²

Further, although it may be assumed that the lessee takes his land subject to the inconvenience and detriment of an overhanging projection, such as a branch, or roof, or cornice (*e.g.*, he could not complain if the shade of a tree prevents crops from growing or water from a roof drips onto his land), is he also presumed to agree that he will accept the risk of the projection falling on his premises? There is very persuasive authority to the contrary. In *Cunard v. Antifyre Ltd.*,³ the plaintiffs were tenants in the defendants' block of flats. The defendants retained the possession and control of the roof, from which a piece of guttering fell through the glass roof of a kitchen and injured the plaintiff's

⁹⁶ See above, §§ 108, 109.

⁹⁷ [1918] 1 K.B. 247.

⁹⁸ If the parties in *Cheater v. Cater* had been adjoining owners the defendant would have been liable: *Crowhurst v. Amersham Burial Board* (1879) 4 Ex.D. 5.

⁹⁹ [1938] 2 K.B. 577. See *Hamson* in (1938) 2 M.L.R. 215.

¹ *Taylor v. Liverpool Corporation* [1939] 3 All E.R. 329, 339.

² In *Shirvell v. Hackwood Estates* the risk of the branches of the dying tree falling had not become substantially greater after the date of the lease: [1938] 2 K.B. 577, 595, 602.

³ [1938] 1 K.B. 551.

wife. A Divisional Court held the defendants liable. Talbot J. said: "The plaintiffs' true cause of action (if they have one) is for negligence, for failure by an occupier of property to take reasonable care that his property does not get into such a state as to be dangerous to adjoining property or persons lawfully thereon . . . it is in our opinion immaterial whether in such a case the plaintiff is in the place where he is injured as one of the King's subjects entitled to use the highway, or in the exercise of any other legal right."⁴ In the same year du Parc J. considered the problem in *Bishop v. Consolidated London Properties*,⁵ in which a tenant's premises were damaged by water flowing from a blocked gutter in the landlord's occupation. Having decided that the lessor was in breach of his express covenant to keep the premises in repair du Parc J. said that even in the absence of such a covenant there was "really no answer to the reasoning which led Scrutton L.J.⁷ to the view that the liability of the landlord in those circumstances depended, not upon any contractual liability, but upon the common law duty of an occupier of dangerous premises to his neighbour," and suggested further that the lessor's duty in such a case might well be comprehended by Lord Atkin's well-known neighbour principle in *Donoghue v. Stevenson*.

(4) Liability of vendor

It is well established that the vendor of a completed house⁸ which turns out to be defective is under no liability to the

⁴ [1939] 1 K.B. 551, 557, 562. Of whom Sir Frank MacKinnon wrote: "On the bench he displayed every quality of the ideal judge. He had learning, dignity, industry, patience, and courtesy: his decisions were invariably right, and on most occasions were thought to be so by the Court of Appeal": *Dictionary of National Biography*, 1931-1940, p. 846. Sir George Talbot was directly descended from Littleton J. (1422-1481), Bromley L.C. (1530-1587), and Talbot L.C. (1685-1737).

⁵ In *Shirrell v. Hackwood Estates* [1938] 2 K.B. 577, 595, Greer L.J. said that if these remarks were inconsistent with the line of cases beginning with *Cavalier v. Pope* they were wrong. But he did not say that they were inconsistent, and in any case it is submitted that there is no inconsistency. The essence of the *Cunard v. Antifyre* principle is that the lessor is still in occupation of the premises which are dangerous: *aliter* in the *Cavalier v. Pope* line of cases.

⁶ (1938) 102 L.J.K.B. 257.

⁷ In *Cockburn v. Smith* [1924] 2 K.B. 119, where the Court of Appeal considered the question without deciding it. See also *Taylor v. Liverpool Corporation* [1939] 1 All E.R. 329, following *Cunard v. Antifyre*.

⁸ Or perhaps even an uncompleted house, when the structure stands at the time of the sale: *Perry v. Sharon Development Co., Ltd.* [1937] 4 All E.R. 390, 394.

purchaser in the absence of an express or implied warranty that the house is reasonably sound and fit for habitation.⁹ If the purchaser has been fortunate or prudent enough to secure an express warranty no question will arise except whether on its true construction it covers the events which have in fact occurred.¹⁰ If there has been no express warranty it sometimes seems to have been assumed that there can never be an implied one. This is true only in the sense that the law does not automatically imply such a warranty in the absence of a stipulation to the contrary, as it does in the case of the sale of a chattel to which section 14 of the Sale of Goods Act, 1893, applies: *caveat emptor* is the general principle governing the sale of completed houses. It is clear, however, that such a warranty may be implied if, according to the familiar principles which govern this matter, the court should decide that in all the circumstances of the case it is proper to do so.¹¹ In any event, the vendor is not liable to the purchaser's visitors.¹² It would be difficult for the law to place them in any better position than the purchaser himself.

Proposals for reform

This immunity of a vendor (or lessor) is capable of giving rise to great injustice. It is too firmly established to be regarded, except by the House of Lords, as having been overruled by *Donoghue v. Stevenson*, but the courts will certainly not extend it. It has been said to be justified on the ground that there is no proximity such as there is in the case of dangerous chattels—houses are not like snails: they can be thoroughly inspected before purchase, and the price or rent of a tumble-down house reflects its condition.¹³ Again, the vendor of a defective house is no longer in occupation of it, and how could it be proved that

⁹ *Perry v. Sharon Development Co., Ltd.* [1937] 3 All E.R. 390. The position is expressly so stated in Condition 12 (3) of the National Conditions of Sale. When, however, the contract is for the sale of a house when completed there is an implied contract that the house shall be completed in such a way that it is fit for human habitation: *Lynch v. Thorne* [1956] 1 W.L.R. 303.

¹⁰ In *Otto & Otto v. Bolton & Norris* [1936] 2 K.B. 46 the first plaintiff succeeded on her claim only because she had obtained such a warranty from one of the defendants.

¹¹ See the authorities fully reviewed in *Brown v. Norton* [1954] I.R. 84.

¹² *Otto & Otto v. Bolton & Norris* [1936] 2 K.B. 46.

¹³ *Voli v. Inglewood Shire Council* (1968) 37 A.L.J.R. 25, 30.

the defect was due to his default as distinct from the age of the house or interference by strangers? But this difficulty could be met by the ordinary principles as to onus of proof. In any event, it is plain that the immunity will not be extended. So it has been held that a builder who is an independent contractor is under a duty to the purchaser and his visitors¹⁴—as indeed would the vendor be if he had done the work as a contractor after the conveyance to the purchaser.¹⁵

(5) Misfeasance after commencement of demise

It should be observed that the foregoing rules as to the exemption of a landlord from liability for the dangerous condition of his property relate solely to his acts of omission or non-feasance. He is not bound to make his premises safe or to ascertain whether they are dangerous in the absence of an express covenant to do so, yet if by a positive act of negligent misfeasance after the commencement of the lease he actually creates a source of danger he is responsible for any accident which is the direct result of his negligence. As we have seen,¹⁶ even a stranger would be so responsible, and the liability of the owner of the premises cannot be less than that of a stranger. The preceding three sentences could not be said to be supported by clear authority until the decision of the House of Lords in *Billings (A. C.) & Sons, Ltd. v. Riden*,¹⁷ for the Court of Appeal in *Malone v. Laskey*¹⁸ had decided that a stranger to a contract of installation and repair (in that case, the wife of a sub-tenant) was without remedy.¹⁹ But in view of developments in the law of negligence since *Donoghue v. Stevenson* the House of Lords overruled *Malone v. Laskey*.

¹⁴ *Sharpe v. Sweeting (E. T.) & Son, Ltd.* [1963] 1 W.L.R. 665.

¹⁵ *Bottomley v. Bannister* [1932] 1 K.B. 458, 477.

¹⁶ Above, § 114.

¹⁷ [1958] A.C. 240.

¹⁸ [1907] 2 K.B. 141. But so far as this case decided that a plaintiff in an action of nuisance must show a proprietary or possessory title (see above, § 22) it is still law.

¹⁹ This was followed in *Ball v. L.C.C.* [1949] 2 K.B. 159. But the actual decision on the facts in *Ball v. L.C.C.* can probably be supported on the ground that the defendants (unlike those in *Malone v. Laskey*) had committed no positive act of misfeasance: they had merely supplied a defective chattel, and it seems settled that in such a case there is no liability unless either the defect is known and the chattel is fraudulently or carelessly represented to be sound or it is held to be within the category of things dangerous *per se*: see below, § 118, and [1958] A.C. at 253.

LIABILITY FOR DANGEROUS CHATTELS

LIABILITY for damage done by dangerous chattels will be considered under three heads:—

- (1) The liability of the possessor of a chattel to persons permitted or invited to make use of it;
- (2) The liability of him who delivers a chattel for damage suffered by the recipient of it;
- (3) The liability of him who delivers a chattel for damage suffered by persons other than the recipient.

§ 116. Duty to Persons Permitted or Invited to Use it

We have already considered this aspect of the law and seen that it is governed by principles similar to those which regulate the position of those who enter on dangerous premises.¹

§ 117. Duty to Immediate Transferee

(1) Transfer under contract

Where a dangerous chattel is delivered by the defendant to the plaintiff, the liability of the defendant depends on the terms, express or implied, of the contract between them. The extent of responsibility varies in different classes of contracts.² Thus in a contract of sale there is in many cases an implied warranty that the goods are fit for the purpose for which they are bought.³ In such cases the seller is responsible in damages for any injury caused by a dangerous imperfection in the goods, apart altogether from any negligence.⁴ A similar warranty may be implied in cases of transactions closely analogous to a contract of sale—*e.g.*, where a dealer supplies a motor-car through a finance company on hire-purchase terms.⁵

¹ Above, § 107.

² *Taylor & Sons v. Union-Castle S.S. Co.* (1932) 48 T.L.R. 249, 250.

³ Sale of Goods Act, 1893, s. 14.

⁴ *Preist v. Last* [1903] 2 K.B. 148; *Frost v. Aylesbury Dairy Co.* [1905] 1 K.B. 608.

⁵ *Andrews v. Hopkinson* [1957] 1 Q.B. 229.

In general it is an implied fundamental term of an agreement between a hirer and a finance company that the vehicle hired shall correspond with the description of the vehicle to be hired.⁶ Under the Hire-Purchase Act, 1964, s. 10, any representations made by a dealer with respect to goods the subject of a hire-purchase agreement shall be deemed to have been made by him as agent for the owner or seller. Further, in contracts to which the Hire-Purchase Acts, 1938 to 1964, apply there are certain implied conditions as to merchantability and description. In a contract for the hiring of chattels there is also a warranty of fitness and safety and a similar liability for dangerous defects.⁷ In a contract for the carriage of goods by a person under a statutory duty to carry there is an implied warranty by the consignor that the goods may be safely carried and are not dangerous,⁸ and if the goods are dangerous the consignor must give notice to such a carrier, unless the means of knowledge that the goods are dangerous are equally open to both parties.⁹

In any event the recipient of a chattel may expressly agree to run all risks and in this case there is no duty even to disclose concealed dangers actually known. Thus in *Ward v. Hobbs*¹⁰ the defendant sold to the plaintiff at auction a herd of pigs which to the knowledge of the defendant were infected with typhoid fever. In the conditions of sale it was provided that the animals were to be sold and taken with all faults and no disclosure of the danger was made. The pigs died, having infected other pigs belonging to the plaintiff which also died; yet it was held by the House of Lords that he had no cause of action.¹¹

⁶ *Astley Industrial Trust, Ltd. v. Grimley* [1963] 1 W.L.R. 584.

⁷ *Reed v. Dean* [1949] 1 K.B. 188. The warranty in contracts of hiring does not extend to latent defects which are not discoverable by reasonable care on the part of anyone. So also with a contract which consists partly in the rendering of services, partly in the supply of goods: *Myers & Co. v. Brent Cross Service Co.* [1934] 1 K.B. 46 (fitting new connecting rods to car); *Watson v. Buckley* [1940] 1 All E.R. 174 (dyeing a man's hair with dangerous hair-dye). The customer should disclose to the contractor any known relevant abnormal circumstance: *Ingham v. Emes* [1955] 2 Q.B. 366 (plaintiff allergic to hair-dye).

⁸ The consignor is probably liable if he does not warn the carrier that the goods are of a dangerous nature, whether he is himself ignorant of the fact or not: *Burley v. Stepney Corporation* [1947] 1 All E.R. 507.

⁹ *Transoceanica Societa v. Shipton* [1923] 1 K.B. 31.

¹⁰ (1878) 4 App.Cas. 13.

¹¹ On the other hand, a sale expressly excluding all warranties leaves subsisting a duty to disclose known dangers: *Clarke v. Army & Navy Co-operative Society* [1903] 1 K.B. 155.

(2) Transfer by way of gift

Story noticed¹² that gifts "have furnished very little occasion for the interposition of judicial tribunals, for reasons equally honourable to the parties and to the liberal spirit of polished society." It has long been settled by good authority that in the case of a gratuitous loan or gift of a chattel, there is not even the duty of reasonable care. The donor or lender of a chattel owes no duty except to give warning of any dangers actually known to him.¹³ In short, the transferee cannot complain if he knows as much about the state of the chattel as does the transferor himself. The only exception to this principle arises when the chattel belongs to the category of things dangerous *per se*¹⁴: liability in such a case does not depend on the donor's knowledge of the defect. In recent years, however, the validity of the principle itself has been questioned on the ground that the decision in *Donoghue v. Stevenson* makes the earlier cases on gifts quite out of date,¹⁵ but it is not clear whether this change in the law is to be ascribed to the principle governing the liability of the manufacturers of chattels or to the wider neighbour principle.¹⁶

§ 118. Duty to Ultimate Transferee

It remains to consider the liability of him who delivers a dangerous chattel for damage suffered, not by the recipient himself, but by some third person. When A, for example, sells or gives a defective gun to B, who sells or gives it to C, who is injured by the bursting of it, is A under any liability to C?

It is clear on general principles that he who by delivering a dangerous chattel to one person causes harm to another is not responsible to the latter merely on the ground that he has been guilty of a negligent breach of a contract with the former.¹⁷

¹² *Commentaries on the Law of Bailments*, s. 285.

¹³ *Gautret v. Egerton* (1867) L.R. 2 C.P. 375; *Coughlin v. Gillison* [1899] 1 Q.B. 145, 147.

¹⁴ For which, see below, § 118.

¹⁵ *Hawkins v. Coulsdon and Purley U.D.C.* [1954] 2 Q.B. 319, 333. Marsh, "The Liability of the Gratuitous Transferor: a Comparative Survey" (1950) 66 L.Q.R. 39, also supports this new view.

¹⁶ *Gledhill v. Liverpool Abattoir Utility Co., Ltd.* [1957] 1 W.L.R. 1028 could be cited to support either view.

¹⁷ *Earl v. Lubbock* [1905] 1 K.B. 253. It is now generally accepted that this case is to be explained on the ground that the duty was here alleged

Nevertheless, although there is no liability in such cases merely on the ground of the defendant's breach of contract with the immediate recipient of the dangerous thing, there are certain other circumstances which will create a good cause of action, and it remains to consider what they are. Such liability exists in the following cases :—

(1) FRAUD

The defendant is responsible if he fraudulently represents the chattel to be safe, and so misleads the recipient into causing damage to the plaintiff. Thus in *Langridge v. Levy*,¹⁸ the defendant sold to the plaintiff's father for the use of the plaintiff a gun which he fraudulently stated to be of good construction, and the plaintiff, having been injured by the bursting of the weapon, was held entitled to sue the seller for damages although there was no contract between them.

(2) NEGLIGENCE

The defendant is liable if he has been guilty of a breach of a duty of care owed to the plaintiff. Such a duty of care will arise in three cases.

(i) Things dangerous in themselves¹⁹

A distinction is drawn between things classed as dangerous in themselves and things dangerous in the particular case or *sub modo*. "It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms,

to arise solely out of contract and that, if properly pleaded, it would be decided differently today: *Haseldine v. C. A. Daw & Sons Ltd.* [1941] 2 K.B. 343, 379. The decision seems to be a good example of the "privity of contract fallacy," discussed above, § 3. In truth it has been distinguished out of existence and Dr. Goodhart has expressed the hope that it will now be decently interred and that its ghost will cease from troubling the law of torts (56 L.Q.R. 22), but in spite of all the obituary notices that have been written "there are still some hopeful spirits who indulge in the vain belief that it can be restored to life" (57 L.Q.R. 164). These include Landon (57 L.Q.R. 182-183), Judge Chapman (54 L.Q.R. 46-48), and, *semble*, Clauson L.J. in *Haseldine v. Daw*, at 368. It must be admitted that plaintiff's counsel insisted that the case did not rest upon contract: [1906] 1 K.B. at 254.

¹⁸ (1837) 2 M. & W. 519.

¹⁹ Stallybrass, "Dangerous Things and the Non-Natural User of Land" (1929) 3 Camb.L.J. 376; Chapman, "Liability for Chattels" (1938) 54 L.Q.R. 46, 57; Goodhart, "Dangerous Things and the Sedan Chair" (1949) 65 L.Q.R. 518.

poisons, explosives, and other things *ejusdem generis*, there is a peculiar duty to take precaution imposed upon those who send forth or instal such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. A loaded gun will not go off unless someone pulls the trigger, a poison is innocuous unless someone takes it, gas will not explode unless it is mixed with air and then a light is set to it. Yet the cases of *Dixon v. Bell* (1816) 5 M. & S. 198, *Thomas v. Winchester* (1852) 6 N.Y. 397, and *Parry v. Smith* (1879) 4 C.P.D. 325, are all illustrations of liability enforced. On the other hand, if the proximate cause of the danger is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable."²⁰ It is a question of law whether a particular chattel is capable of coming within the category of things dangerous *per se* and a question of fact whether it is dangerous in all the circumstances of the case.²¹ The following chattels, amongst others,²² have been held to be dangerous: loaded guns,²³ petrol,²⁴ explosives,²⁵ an electric space-heater,²⁶ noxious hair-dye,²⁷ and earthenware jars containing sulphuric acid.²⁸

The distinction doubted

There is, however, also a remarkable number of judicial statements casting doubt upon the validity of the distinction between things dangerous *per se* and things dangerous *sub modo*. The distinction is certainly difficult to support in principle. There is nothing which is at all times and in all circumstances dangerous; there is an element of danger in every chattel.²⁹ Scrutton

²⁰ *Dominion Natural Gas Co. v. Collins* [1909] A.C. 640, at 646, *per Lord Dunedin*. In *Donoghue v. Stevenson* [1932] A.C. 562, at 596, Lord Atkin said this statement "exactly summed up the position" and it has often been cited with approval since.

²¹ *Blacker v. Lake & Elliot, Ltd.* (1912) 106 L.T. 558.

²² For a complete list, see Charlesworth, *Negligence*, para. 506.

²³ *Sullivan v. Creed* [1904] 2 I.R. 317, 340.

²⁴ *Jefferson v. Derbyshire Farmers, Ltd.* [1921] 2 K.B. 281, 290.

²⁵ *Rainham Chemical Works v. Belvedere Fish Guano Co.* [1921] 2 A.C. 465.

²⁶ *Robinson v. Technico, Ltd.* (1953) unreported (see Delany, 70 L.Q.R. 170).

²⁷ *Watson v. Buckley* [1940] 1 All E.R. 74.

²⁸ *Adelaide Chemical Co., Ltd. v. Carlyle* (1940) 64 C.L.R. 514.

²⁹ *Oliver v. Saddler* [1929] A.C. 584, 599.

L.J. said³⁰: "Personally, I do not understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing instead of an obvious wolf." But all the members of the House in *Donoghue v. Stevenson*³¹ appear to have agreed that the distinction, whether natural or not, is accepted in English law. Nor did Lord Wright think that in practice there is any difficulty in drawing the line.³² "Some things are obviously and necessarily dangerous unless the danger is removed by appropriate precautions. . . . Others are only dangerous if there is negligence."³³ He gave as illustrations of the former category a savage animal and a performance on a flying trapeze, but the latter is not a chattel. In another case³⁴ he defined an inherently dangerous thing as "something which if left, may at any moment, and under modern circumstances, cause damage," and said that "a naked sword or hatchet or a loaded gun or an explosive are clearly inherently dangerous, that is to say, they cannot be handled without a serious risk."³⁵

The modern view. Singleton L.J. said that the following passage from the argument of Sir Hartley Shawcross, Att.-Gen., in *Read v. J. Lyons & Co.*³⁶ summarised the present law neatly and accurately³⁷: "The true question is not whether a thing is dangerous in itself but whether, by reason of some extraneous

³⁰ *Hodge & Sons v. Anglo-American Oil Co.* (1922) 12 Ll.L.Rep. 183, at 187. Stable J. also said "I do not think I have ever fully grasped" the distinction: *Beckett v. Newalls Insulation Co.* [1953] 1 W.L.R. 8, 12. Similar statements: *Donoghue v. Stevenson* [1932] A.C. 562, 595; *Parker v. Olozo, Ltd.* [1937] 3 All E.R. 524, 528; *Watson v. Buckley* [1940] 1 All E.R. 174, 184.

³¹ [1932] A.C. 562, 569, 595, 600, 602, 611.

³² *Wray v. Essex C.C.* [1936] 3 All E.R. 97, 102 (oilcan not inherently dangerous).

³³ *Glasgow Corporation v. Muir* [1943] A.C. 448, at 464.

³⁴ *Wray v. Essex C.C.* [1936] 3 All E.R. 97, 101-102.

³⁵ In *Ball v. L.C.C.* [1949] 2 K.B. 159, 172, Tucker L.J. described the summary of judicial opinion in the text as "very convenient." In this case the C.A. held that a domestic steam boiler without a safety-valve is not a thing dangerous *per se*. The High Court of Australia has held a "shanghai" (anglice, catapult) not within the category: it is "a common object in boyhood life": *Smith v. Leurs* (1945) 70 C.L.R. 256. Nor is an airgun: *Donaldson v. McNiven* [1952] 2 All E.R. 691.

³⁶ [1947] A.C. 156, 161.

³⁷ *Beckett v. Newalls Insulation Co., Ltd.* [1953] 1 W.L.R. 8, at 15.

circumstances, it may become dangerous. There is really no category of dangerous things; there are only some things which require more and some which require less care." In other words, the measure of care increases in proportion with the danger involved in the custody or control of an agency potentially harmful, that is to say, the danger should the safeguards employed, if any, prove insufficient or unsuccessful.³⁸ Even if the category of things dangerous *per se* does exist, the liability of the owner of such an object is not absolute: he is not an insurer.³⁹ "There must always be found somewhere the element of negligence on his part to make the owner of a chattel liable."⁴⁰ The case of dangerous things, is "a special instance of negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety."⁴¹ In truth, the time has surely come to recognise clearly that since the decision in *Donoghue v. Stevenson* the category of things dangerous *per se* has become unnecessary⁴²: the sole question now is whether the degree of care appropriate to the circumstances has been exercised. The fact that there is a special duty to take precautions does not mean that there is a special category in which alone the duty exists.⁴³

(II) Non-disclosure of known dangers

If the defendant has actual knowledge of the dangerous nature of the chattel delivered by him, and gives no warning of it to the recipient, he may be liable for resulting injury to third persons even though the chattel is not within the category of things dangerous *per se*.⁴⁴ In other words a chattel not dangerous in itself is brought into the category of dangerous things if there is knowledge of a dangerous defect,⁴⁵ as where a

³⁸ *Swinton v. The China Mutual Steam Navigation Co., Ltd.* (1951) 83 C.L.R. 553, 566-567. In such a case not only the degree of care but also the range of persons to whom a duty is owed may be extended: *Donoghue v. Stevenson* [1932] A.C. 562, 596.

³⁹ *Adelaide Chemical Co. v. Carlyle* (1940) 64 C.L.R. 514.

⁴⁰ *Oliver v. Saddler* [1929] A.C. 584, at 599, *per Lord Dunedin*.

⁴¹ *Donoghue v. Stevenson* [1932] A.C. 562, at 611-612.

⁴² As *Goddard L.J.* affirmed as long ago as *Paine v. Colne Valley Electricity Supply Co., Ltd.* [1938] 4 All E.R. 803, 808.

⁴³ The preceding paragraph was cited with approval in *Rae v. T. Eaton & Co., Ltd.* (1958) 28 D.L.R. (2d) 522, at 529-530, *per Patterson J.*

⁴⁴ *Barnes v. Irwell Valley Water Board* [1939] 1 K.B. 21, 44, 46.

⁴⁵ As with the doctrine of *scienter* in the case of animals.

valve was reassembled with the bridge upside down so that steam escaped and scalded the plaintiff.⁴⁶

Nature of the duty. If A places in the hands of B a chattel which belongs to the category of things dangerous *per se*, or if A actually knows of some dangerous defect, a duty of care rests upon A, not only towards the recipient, but also towards all such persons as may reasonably be contemplated as likely to be endangered.⁴⁷ Thus in *Farrant v. Barnes*⁴⁸ the defendant delivered to a carrier a carboy of nitric acid without informing him of the dangerous nature of its contents, and was held liable in damages to the carrier's servant who was injured by the bursting of the carboy while he was carrying it on his shoulders. This duty is clearly similar to that which is owed by the donor to the donee in the case of a gift or gratuitous bailment.⁴⁹ But in one respect it is more onerous. "The duty has never been stated to rest on knowledge. If A chooses to sell things of a class dangerous in themselves he cannot be heard to say he did not know of or appreciate the danger."⁵⁰ In another respect, however, it may be less onerous, for in certain cases the duty of the transferor may be discharged if he delivers the article to a competent person who knows of the danger already or is given an adequate warning about it.⁵¹ The transferor may be entitled to assume that the recipient will pass on the warning to the ultimate transferee, or will so act as to minimise or nullify the danger. So in *Holmes v. Ashford*⁵² the manufacturer of hair-dye was held not liable to one who had contracted dermatitis after the dye had been applied by a hairdresser, for it was shown that the dye had been delivered to the hairdresser by the manufacturer with an adequate warning of its potential dangers. Yet a warning is not

⁴⁶ *Howard v. Furness Houlder, Ltd.* [1936] 2 All E.R. 781, 792.

⁴⁷ *Anglo-Celtic Shipping Co., Ltd. v. Elliott* (1926) 42 T.L.R. 297; *Adelaide Chemical & Fertiliser Co., Ltd. v. Carlyle* (1940) 64 C.L.R. 514; *Robinson v. Technico, Ltd.* (1953) unreported (see 70 L.Q.R. 170).

⁴⁸ (1862) 11 C.B.(N.S.) 553.

⁴⁹ *Blacker v. Lake and Elliot* (1912) 106 L.T. 533, 540.

⁵⁰ *Burfit v. Kille* [1939] 2 K.B. 743, at 749, *per* Atkinson J.

⁵¹ It may even be that neither the warning nor the knowledge need be of the exact amount of the danger: *Bottomley v. Bannister* [1932] 1 K.B. 458, 478.

⁵² [1950] 2 All E.R. 76. Yet it may be asked why a person who has created a dangerous situation should be held not liable on the ground that it has not been abated by another whose duty it was to do so: Goodhart, 57 L.Q.R. 163, and see cases cited below, § 119.

a sufficient discharge of the duty if the person to whom the chattel is delivered is not a competent person—e.g., a child to whom a defective “safety-pistol”⁵³ or petrol⁵⁴ is sold.

(iii) Negligence with respect to unknown dangers

Before 1932 it was extremely doubtful whether there was any liability on the part of a manufacturer of goods to the ultimate consumer or user with whom there was no contractual relationship, when there was no fraud, when he did not know the article to be dangerous, and when it did not belong to the category of things dangerous *per se*. But in that year the decision of a majority of the House of Lords in *Donoghue v. Stevenson*,⁵⁵ an appeal from the Court of Session, established that in such circumstances the manufacturer might owe a duty to the ultimate consumer. We shall proceed to discuss this great case in fuller detail.

§ 119. *Donoghue v. Stevenson*

The question for the House of Lords in this appeal was whether the averments made by the pursuer in her pleadings, if true, disclosed a good cause of action. The pursuer's averments were that she had entered a café in Paisley occupied by one Minchella and that a friend⁵⁶ who accompanied her had bought from Minchella some refreshment for both of them. The refreshment consisted of two slabs of ice-cream, each of which was placed in a tumbler, and over which was then poured part of the contents of a bottle of ginger-beer. The ginger-beer had been manufactured by the defender Stevenson, and bought from him by Minchella. It was contained in a stoppered bottle made of dark opaque glass. When the pursuer had partly finished the confection, her friend attempted to replenish her glass by pouring into it the remains of the contents of the bottle. As she was doing this the remains of a decomposed snail floated out. The appellant averred that as a result of the nauseating sight of the snail and the impurities in the ginger-beer which she had already consumed, she had suffered

⁵³ *Burfitt v. Kille* [1939] 2 K.B. 743, 748.

⁵⁴ *Yachuk v. Oliver Blais Co.* [1949] A.C. 386.

⁵⁵ [1932] A.C. 562. See Heuston, “*Donoghue v. Stevenson* in Retrospect” (1957) 20 M.L.R. 1, and above, § 80.

⁵⁶ Who seems to have been female and not male: see Lord Macmillan's speech.

from shock and severe gastro-enteritis. A majority of the House of Lords (Lords Atkin, Macmillan, and Thankerton) held that if the pursuer could prove that which she averred she would have a good cause of action.⁵⁷

"If your Lordships," said Lord Atkin,⁵⁸ "accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care. It is a proposition which I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense."

Whatever hesitations may have been felt about Lord Atkin's attempt to formulate a general criterion of the duty of care⁵⁹ this exposition of the obligation owed by a manufacturer of chattels in the circumstances mentioned has never been questioned. Indeed, in the years since 1932 it has been adopted and expanded in nearly one hundred reported cases throughout the common law world.⁶⁰ It will be convenient to discuss briefly some of the more significant phrases in this passage⁶¹:

⁵⁷ There has been a persistent rumour (which has found support in the Court of Appeal: see *Adler v. Dickson* [1954] 1 W.L.R. 1482, 1483) that when the case was tried it was discovered that there never had been a snail in the bottle at all. This is not so. The truth is that the issue of fact was never decided: the defender died before proof and the pursuer in consequence compromised the action and received £100 in settlement of her claim: see *Heuston*, 20 M.L.R. 2, n. 5.

⁵⁸ [1932] A.C. 562, at 599.

⁵⁹ See above, § 80.

⁶⁰ See 36 *English & Empire Digest* 458, and also *Kirby v. Burke* [1944] I.R. 207.

⁶¹ This mode of exposition is adopted simply for the sake of clarity and simplicity: no countenance is intended to be given to the heresy of treating the words of a famous judgment as if they were a passage in a statute. What follows owes much to articles by Glanville Williams, "Negligent Contractors and Third Parties" (1942) 92 L.J.Newsp. 115, 124, 132, and

(1) "A manufacturer"

The principle has been extended to include repairers,⁶² assemblers⁶³ and erectors⁶⁴ and builders.⁶⁵ Those who let out goods on hire are probably also included.⁶⁶ It has been argued that the principle should not include vendors, bailors, or donors of articles not dangerous *per se*, who know nothing of the defect, have not created it, and do not fraudulently or carelessly represent that the article is harmless⁶⁷ on the ground that they have done nothing to create the danger, and to hold them responsible would come very near to imposing liability for mere omissions.⁶⁸ But liability has been imposed⁶⁹ upon a dealer in second-hand motor-cars who supplied the plaintiff⁷⁰ with a vehicle containing a latent defect. The defect would have been discoverable by a reasonable examination, but the defendant neither carried out such an examination nor warned the plaintiff that he had not done so. No doubt the social importance of preventing defective vehicles being allowed on the highways justifies such a decision.

(2) "Of products"

This is no longer limited to articles of food or drink. It includes, for example, underwear,⁷¹ tombstones,⁷² motor-cars,⁷³

Underhay, "Manufacturers' Liability: Recent Developments of *Donoghue v. Stevenson*" (1936) 14 Can.Bar Rev. 283. See also James, "Liability of Manufacturers" (1960) Jo. of Business Law 287; Prosser, "The Assault upon the Citadel" (1960) 69 Yale L.J. 1009.

⁶² *Malfrout v. Nozal* (1935) 51 T.L.R. 551; *Stennett v. Hancock* [1939] 2 All E.R. 578; *Herschthal v. Stewart & Arden* [1940] 1 K.B. 155; *Haseldine v. Daw* [1941] 2 K.B. 343; *Power v. Bedford Motor Co., Ltd.* [1959] I.R. 391.

⁶³ *Howard v. Furness Hculder Ltd.* [1936] 2 All E.R. 296.

⁶⁴ *Brown v. Cotterill* (1934) 51 T.L.R. 21.

⁶⁵ *Sharpe v. E. T. Sweeting & Son Ltd.* [1963] 1 W.L.R. 665.

⁶⁶ *White v. Steadman* [1913] 3 K.B. 340.

⁶⁷ The distributors in *Watson v. Buckley and Osborne, Garrett & Co. Ltd.* [1940] 1 All E.R. 74, were liable on the last ground: they had distributed to the hairdressing trade with laudatory advertisements a dye which they had not tested at all and which had been made by "a gentleman who had emerged quite unexpectedly from Spain."

⁶⁸ See Baker, "The Liability to Third Persons of the Transferor of Defective Chattels" (1951) 25 Austr.L.J. 2; Fleming, *Torts*, p. 475.

⁶⁹ *Andrews v. Hopkinson* [1957] 1 Q.B. 229.

⁷⁰ By way of a hire-purchase transaction—i.e., the dealer sold the car to a finance company, who in turn leased it to the plaintiff under a hire-purchase agreement. In strict legal analysis, therefore, the relationship of vendor and purchaser did not exist between the plaintiff and the dealer.

⁷¹ *Grant v. Australian Knitting Mills* [1936] A.C. 85.

⁷² *Brown v. Cotterill* (1934) 51 T.L.R. 21.

⁷³ *Herschthal v. Stewart & Arden* [1940] 1 K.B. 155.

lifts,⁷⁴ hair-dye⁷⁵ and ships' telegraphs.⁷⁶ The only items which have been definitely excluded from this category are house-property and articles installed in or upon such property, by the vendor or lessor of the premises, as distinct from any contractor of his.⁷⁷ Careless statements were once also excluded, but there may now be liability for them.⁷⁸

(3) "Which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him"

First, it should be noted that "consumer" has been extended to include the ultimate user of the article,⁷⁹ or, indeed, anyone through whose hands the article may pass,⁸⁰ and perhaps even anyone who is in physical proximity to it.⁸¹

Secondly, it is not of the essence of this principle that the article should reach the consumer or user in the same sealed package or container in which it left the manufacturer: it is enough to show that it reached him subject to the same defect. This was made clear in *Grant v. Australian Knitting Mills*.⁸² In this case the plaintiff contracted dermatitis as a result of wearing woollen underwear containing an excess of sulphites. The underwear had been sent out by the defendant manufacturers in paper packets containing six sets of which two were sold by retailers to the plaintiff: yet the manufacturers were held liable.

Thirdly, the use of the article for a purpose materially different from that which the maker designed it or which he might reasonably be taken to have contemplated may afford an answer

⁷⁴ *Haseldine v. Daw* [1941] 2 K.B. 343.

⁷⁵ *Watson v. Buckley* [1940] 1 All E.R. 174.

⁷⁶ *Hindustan S.S. Co. Ltd. v. Siemens Bros. & Co., Ltd.* [1955] 1 Lloyd's Rep. 167. (In this case the article was defective because of its design.)

⁷⁷ See above, § 115.

⁷⁸ See above, § 83.

⁷⁹ *Grant v. Australian Knitting Mills* [1936] A.C. 85.

⁸⁰ *Barnett v. Packer* [1940] 3 All E.R. 575 (shop-assistant laying out chocolates for display injured by protruding wire).

⁸¹ *Brown v. Cotterill* (1934) 51 T.L.R. 21 (child on tombstone); *Stennett v. Hancock* [1939] 2 All E.R. 578 (pedestrian hit by lorry-wheel). Yet see the doubts of Lord Goddard C.J. in *Shave v. Rosner* [1954] 2 All E.R. 280, 282 (a passage not reported in [1954] 2 Q.B. 113).

⁸² [1936] A.C. 85.

to a claim based on the article's defective condition.⁸³ Further, it may well be that after the article has left the manufacturer's hands it has been exposed to vicissitudes which render it defective and for which the manufacturer is in no way to blame: in such a case the plaintiff will have failed to prove that the cause of the damage was the negligence of the manufacturer.⁸⁴

(4) "With no reasonable possibility of intermediate examination"

Here three different situations have given rise to difficulty. First, there may have been an opportunity for examination, but that opportunity has not been taken; secondly, such an opportunity may have been taken, but without success, so that the defect is still unrevealed; thirdly, the opportunity may have been taken successfully, and the defect revealed, but the plaintiff has nevertheless used the article in its defective condition.

(i) Opportunity not used

Does the mere existence of an opportunity for intermediate examination, even if it is not used, or indeed expected by anyone that it could or would be used, suffice to exonerate the defendant? In *Donoghue v. Stevenson* itself it was of course unnecessary for Lord Atkin to consider anything else than a "reasonable possibility," for the facts were of a nature which not merely precluded examination by any person interposed between the manufacturer and the consumer but also made it unlikely in the extreme that the consumer would discover the defect for himself. After an initial period of uncertainty,⁸⁵ it is now plain⁸⁶ that the mere existence of such an opportunity will not exonerate the

⁸³ *Davie v. New Merton Board Mills Ltd.* [1957] 2 Q.B. 368 (Ashworth J.—the point was not considered on appeal in either the C.A. or the H.L.).

⁸⁴ In *Donoghue v. Stevenson* at 622, Lord Macmillan suggested that "it may be a good general rule to regard responsibility as ceasing when control ceases," but in *Grant's* case Lord Wright showed (at 104) that this test might sometimes prove unhelpful. This is important, because Lord Macmillan was a member of the Judicial Committee in *Grant's* case and would hardly have accepted an incorrect interpretation of his judgment in *Donoghue v. Stevenson*.

⁸⁵ *Farr v. Butters Bros.* [1932] 2 K.B. 606; *Dransfield v. British Insulated Cables Ltd.* [1937] 4 All E.R. 382. See Goodhart, "*Dransfield v. British Insulated Cables, Ltd.*" (1938) 54 L.Q.R. 59.

⁸⁶ *Shields v. Hobbs, etc. Co.* (1962) 84 D.L.R. (2d) 307; *Cathcart v. Hall* [1963] N.Z.L.R. 373.

defendant⁸⁷: the proper question is whether he should reasonably have expected that the plaintiff would use the opportunity for inspection in such a way as to give him warning of the risk. In short, the decision in *Donoghue v. Stevenson* did not depend on the bottle being stoppered and sealed.⁸⁸ Thus in *Grant v. Australian Knitting Mills*⁸⁹ the manufacturers' contention that the purchaser could have protected himself by washing the underwear before use⁹⁰ was answered by Lord Wright in one sentence: "It was not contemplated that they should be first washed." "If there was any doubt about the governing principle of *Donoghue v. Stevenson*, Lord Wright has dissipated it."⁹¹

Warning notices. One way in which the manufacturer could show that he reasonably expected intermediate examination would be by showing that he had attached to the article a warning notice which was adequate in all the circumstances of the case.⁹² In such an event, it would be the retailer and not the manufacturer who would in general be responsible to the ultimate user. Apparently it is enough if the contemplated examination is to be carried out by some person interposed between the defendant and the plaintiff—e.g., the retailer.⁹³ So in *Holmes v. Ashford*⁹⁴ the defendants, manufacturers of a dangerous hair-dye, were held to have discharged their duty by giving an adequate warning to the hairdresser. It would have been unreasonable to have required them to give warning in such a form that it must come to the knowledge of each particular customer. It should be noticed that

⁸⁷ So in *Paine v. Colne Valley Electricity Co.* [1938] 4 All E.R. 803, 808, Goddard L.J. suggested that Lord Atkin meant "possibility in a business sense," for a "person who buys 100 cases of tinned salmon from the packers has a physical opportunity of examining each tin. Commercially speaking it would be impossible for him to do so." As Finnmore J. remarked, many reputable manufacturers would be insulted at the suggestion that inspection of their products was necessary before use: *Mason v. Williams & Williams, Ltd.* [1955] 1 W.L.R. 649, 551. Cf. *Haseldine v. Daw* [1941] 2 K.B. 343, 376; *Howard v. Walker* [1947] K.B. 860, 863.

⁸⁸ *Clay v. Crump & Co., Ltd.* [1964] 1 Q.B. 533, 558.

⁸⁹ [1936] A.C. 85, 105.

⁹⁰ A practice adopted by "some rather particular people": [1941] 2 K.B. 377.

⁹¹ *Haseldine v. Daw & Son, Ltd.* [1941] 2 K.B. 343, at 377, per Goddard L.J. See the full review of authorities in *Herschtal v. Stewart & Ardern, Ltd.* [1940] 1 K.B. 155.

⁹² *Kubach v. Hollands* [1937] 3 All E.R. 907; *Holmes v. Ashford* [1950] 2 All E.R. 76.

⁹³ *Herschtal v. Stewart & Ardern* [1940] 1 K.B. 155; *Haseldine v. Daw* [1941] 2 K.B. 343, 375-378; *London Graving Dock Co. v. Horton* [1951] A.C. 737, 750, 757.

⁹⁴ [1950] 2 All E.R. 76. See above, p. 430.

it is not necessary for the defendant to prove that the plaintiff consumed or used the article with full knowledge of the risk: it is enough if examination and consequent knowledge are to be expected.⁹⁵

(ii) *Opportunity used, but unsuccessfully*

What is the position if an intermediate examination has been carried out, but so carelessly that it fails to reveal the defect? It was once held that the manufacturer is exonerated in such circumstances,⁹⁶ but the prevalent view now is that the manufacturer is not in general excused by the fact that an intermediary has failed to perform his duties properly.⁹⁷ Thus an architect who carelessly plans a building or supervises a demolition operation may be liable to any lawful visitor to the premises, and is not entirely exempt from liability merely because the builders or demolition contractors⁹⁸ or a public authority⁹⁹ have inspected the plans or the site.

(iii) *Successful intermediate examination*

The general principle is that if the plaintiff has discovered the defect for himself he is without remedy: "The principle of *Donoghue's* case can only be applied where the defect is hidden and unknown to the consumer, otherwise the directness of cause and effect is absent: the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows, because it follows from his own conscious volition in choosing to incur the risk or certainty of mischance."¹ This is the explanation of *Farr v. Butters Bros.*,² a case which seems to have caused some difficulty. The defendant crane-manufacturers sent out a crane in parts to be assembled by the buyers. Their foreman, an experienced man, realised that it was defective but nevertheless assembled and worked it and was killed. The defendants were held not liable;

⁹⁵ *London Graving Dock Co. v. Horton* [1951] A.C. 737, 750.

⁹⁶ *Buckner v. Ashby and Horner, Ltd.*, [1941] 1 K.B. 321.

⁹⁷ *Power v. Bedford Motor Co.* [1959] I.R. 391; *Clay v. A. J. Crump & Sons, Ltd* [1968] 1 Q.B. 533.

⁹⁸ *Clay v. A. J. Crump & Sons, Ltd.* [1963] 1 Q.B. 533.

⁹⁹ *Voli v. Inglewood Shire Council* (1963) 37 A.L.J.R. 25.

¹ *Grant v. Australian Knitting Mills* [1936] A.C. 85, at 105, per Lord Wright.

² [1932] 2 K.B. 606.

the plaintiff had deliberately incurred the risk.³ On the other hand this principle does not apply when it could reasonably be contemplated that the plaintiff, despite his knowledge of the defect, might yet reasonably incur the risk. Thus in *Denny v. Supplies & Transport Co.*⁴ the defendants sent out a barge loaded with timber so badly stowed that the plaintiff, who realised the danger, was injured while unloading it in the course of his employment. There was no practicable alternative course of action open to him for it was shown that there is no safe way of unloading badly stowed timber.⁵ It was held that the plaintiff's opportunity of inspection did not break the chain of causation. There is no magic in a warning, and a danger is not removed by the mere process of the plaintiff gazing at it.⁶

(5) "And with the knowledge that the absence of reasonable care in the preparation or putting up of the products "

Reasonable care must be taken to ensure not only that the product itself is safe but also that any container or package in which it is sent out is suitable for its purpose.⁷ Reasonable care must also be taken to ensure that any labels or instructions which accompany the article and are necessary for its proper use are so worded as to ensure that the article can be used with safety.⁸ For sometimes an article of the highest standard of construction may be rendered dangerous by some misrepresentation which

³ The Court of Appeal upheld McCordie J. in refusing to allow the case to go to the jury. Today, when the courts have power to apportion the damages, the issue of contributory negligence would probably be left to the jury. (Neither *volenti non fit injuria* nor contributory negligence was pleaded in this case.)

⁴ [1950] 2 K.B. 374.

⁵ This clearly distinguishes the case from *Farr v. Butters Bros.*, where there was no evidence of any legal or economic obligation on the plaintiff to work the crane until the defect had been remedied: see 66 L.Q.R. 427, and *Goodman v. New Plymouth Fire Board* [1958] N.Z.L.R. 767; *Gledhill v. Liverpool Abattoir Utility Co., Ltd.* [1958] 1 W.L.R. 1028.

⁶ *A. C. Billings & Sons, Ltd. v. Riden* [1958] A.C. 240. Compare the law governing visitors to premises, above, § 109.

⁷ *Donoghue v. Stevenson* [1932] A.C. 562, 595, 616, which must be taken to have overruled *Bates v. Batey & Co.* [1918] 3 K.B. 351, though Horridge J. (who had decided it) thought not in *Pattendon v. Beney* (1933) 50 T.L.R. 10. Pollock (50 L.Q.R. 28) said that the opinions of the Law Lords had brought *Bates v. Batey & Co.* "well within the classical precept, 'Put that case out of your books, for it is not law.'"

⁸ *Blacker v. Lake & Elliot* (1912) 106 L.T. 538, 541; *Kubach v. Hollands* [1937] 3 All E.R. 907; *Watson v. Buckley* [1940] 1 All E.R. 174; *Holmes v. Ashford* [1950] 2 All E.R. 76.

accompanies it—e.g., a steam boiler when the figures on the pressure gauge have been misplaced.⁹

(6) "Will result in injury to the consumer's life or property"

The principle enunciated by Lord Atkin is properly limited to cases where physical injury to person or property has been caused. It does not by itself afford a remedy for pecuniary loss suffered by relying on a negligent misrepresentation.¹⁰

(7) "Owes a duty to take that reasonable care"

The onus of proving negligence rests on the plaintiff. There has been some dispute whether he can pray in aid the maxim *res ipsa loquitur*. In principle there seems to be no reason why he should not be permitted to do so.¹¹ Thus in *Grant v. Australian Knitting Mills* (in which the defendants showed that their factory was the most up to date possible and that they had sold over a million similar garments without complaint) the Judicial Committee said: "If excess sulphites were left in the garment, that could only be because someone was at fault. The appellant is not required to lay his finger on the exact person in all the chain who was responsible, or to specify what he did wrong. Negligence is found as a matter of inference from the existence of the defects taken in conjunction with all the known circumstances."¹² It is submitted that this is the better opinion.¹³

Date at which duty arises

For the purposes of the law relating to limitation of actions, it may be necessary to ascertain the moment of time at which

⁹ *Hindustan S.S. Co., Ltd. v. Siemens Bros. & Co., Ltd.* [1955] 1 Lloyd's Rep. 617.

¹⁰ See above, § 83.

¹¹ *Contra*, Lord Macmillan in [1932] A.C. 562, at 622.

¹² [1936] A.C. 85, 101. It will be recalled that Lord Macmillan was a member of the Board.

¹³ See also *Cassidy v. Ministry of Health* [1951] 2 K.B. 343, 359; *Mason v. Williams & Williams, Ltd.* [1955] 1 W.L.R. 549; *Lockhart v. Barr*, 1943 S.C. 1, and *Steer v. Durable Rubber Manufacturing Co. Ltd.* [1958] C.L.Y. 2250 (hot-water bottle). *Daniels v. White & Son* [1938] 4 All E.R. 258 (manufacturers of lemonade containing carbolic acid excused when they proved "a fool-proof method" of cleaning and filling the bottles and adequate supervision) is contrary to *Grant's* case and to the decision of a strong Court of Appeal in *Chaproniere v. Mason* (1905) 21 T.L.R. 638 (stone in Bath bun): see 55 L.Q.R. 6, 352, and Underhay in 14 Can.Bar Rev. 287-294.

the duty arises. It seems that the duty arises at the stage of manufacture and is a continuing duty, although the plaintiff's cause of action does not accrue until he has suffered damage ¹⁴ which is more than minimal.¹⁵

¹⁴ *Watson v. Winget, Ltd.*, 1960 S.C. 100, and below, § 224.

¹⁵ *Cartledge v. Jopling & Sons, Ltd.* [1968] A.C. 758. For undiscoverable damage, see below, § 224.

THE RULE IN *RYLANDS v. FLETCHER* AND LIABILITY FOR FIRE

§ 120. Rule in *Rylands v. Fletcher*¹

THE rule known as that in *Rylands v. Fletcher*² is one of the most important cases of absolute or strict³ liability recognised by our law—one of the chief instances in which a man acts at his peril and is responsible for accidental harm, independently of the existence of either wrongful intent or negligence. The rule may be formulated thus:—

The occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the direct consequences of its escape, even if he has been guilty of no negligence.⁴

In *Rylands v. Fletcher*² the defendants constructed a reservoir upon their land, in order to supply water to their mill, and upon the site chosen for this purpose there was a disused and filled-up shaft of an old coal mine, the passages of which communicated with the adjoining mine of the plaintiff. Through the negligence of the contractors or engineers by whom the work was done (and who were not the servants of the defendants) this fact was not discovered, and the danger caused by it was not guarded against. When the reservoir was filled, the water escaped down the shaft and thence into the plaintiff's mine, which it flooded. It was not immediately obvious what cause of action was available. It was not trespass, as the damage

¹ See Prosser, *Topics*, Chap. III; F. H. Newark, "Non-natural user and *Rylands v. Fletcher*" (1961) 24 M.L.R. 557.

² (1868) L.R. 3 H.L. 330.

³ Winfield suggested, "The Myth of Absolute Liability" (1926) 42 L.Q.R. 37, 51, that "strict" was a better term than "absolute" in view of the admitted exceptions to the rule, and this, according to Scott L.J., is now recognised as the appropriate term in English law: *Read v. Lyons & Co.* [1945] K.B. 216, 226.

⁴ This sentence was cited with approval in *St. Anne's Well Brewery Co. v. Roberts* (1929) 140 L.T. 1, 6; *Hale v. Jennings Bros.* [1938] 1 All E.R. 579, 582, 584; *Read v. J. Lyons & Co., Ltd.* [1945] K.B. 216, 247; and *Vaughn v. Halifax-Dartmouth Bridge Commission* (1961) 29 D.L.R. (2d) 523, 525.

was not immediate; it was not nuisance, as the damage was not due to any recurrent condition or state of affairs; and it was not negligence, for the defendants had not been negligent—and, in addition, the case arose eleven years before a clear decision⁵ imposing liability for the default of an independent contractor. But in a judgment which has always been recognised as one of the masterpieces of the Law Reports, Blackburn J., for the Court of Exchequer Chamber, held the defendants liable, and the House of Lords dismissed their appeal. Blackburn J. said⁶:

“The question of law therefore arises, What is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless while it remains there, will naturally do mischief if it escapes out of his land? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours: but the question arises whether the duty which the law casts upon him under such circumstances is an absolute duty to keep it at his peril or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more. . . .

We think that the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major* or the act of God; but as nothing of the sort exists here, it is unnecessary to inquire what excuse would be sufficient.”

§ 121. Origin and Nature of Rule⁷

It is important to distinguish between the immediate and the more remote origins of the Rule in *Rylands v. Fletcher*.

⁵ *Bower v. Peate* (1876) 1 Q.B.D. 321.

⁶ *Fletcher v. Rylands* (1866) L.R. 1 Ex. 265, at 279.

⁷ See next page.

Immediate origins. The fundamental phrase in Sir Colin Blackburn's judgment is that which runs: "the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes." The basis of liability is the artificial accumulation of things not in or on the land by the ordinary course of nature. This can be clearly seen if we distinguish three cases of damage done by water:

(i) rain falls on the defendant's land, and the resultant water passes off by natural gravitation on to the plaintiff's premises. The defendant is not responsible, as there is no liability under *Rylands v. Fletcher* for things naturally on the land;⁸

(ii) water accumulates itself on the defendant's land in the ordinary course of nature, and is released on to the plaintiff's land by the defendant carrying on his normal operations in a reasonable way. Thus in *Smith v. Kenrick*⁹ it was held that the plaintiff had no cause of action when water which had accumulated itself in a natural pool or reservoir flowed into the plaintiff's mine as a result of the ordinary mining operations of the defendant;

(iii) water is accumulated by the defendant for his own purposes and then flows on to the plaintiff's land. Here the defendant is liable. The distinction between the *Smith v. Kenrick* type of case and the *Rylands v. Fletcher* type of case is that between the escape of water naturally present on the defendant's land and the escape of water artificially accumulated there, To quote Blackburn J. once more:

"The general rule as above stated seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own

⁷ See Molloy, "*Fletcher v. Rylands*—A Re-Examination of Juristic Origins" (1941) 9 U.Chi.L.Rev. 266; Newark, "Non-Natural User and *Rylands v. Fletcher*" (1961) 24 M.L.R. 557; Prosser, *Topics*, Chap. III.

⁸ See below, § 125.

⁹ (1849) 7 C.B. 515.

property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have occurred, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stenchcs."

Remoter origins of the rule

(i) *Historical*

The historical background of the rule in *Rylands v. Fletcher* was fourfold. In early law a landowner had four remedies against his neighbour whose use of his land injuriously affected him in the exclusive enjoyment of his property; the action of trespass where the injury was direct, the assize of nuisance in which the primary object of the proceedings was abatement, the action upon the case "upon the custom of the realm" for harm done by the spread of fire, and the action of cattle-trespas. To none of these actions was it a good defence to prove that the defendant was without fault. When the action upon the case for nuisance took the place of the assize of nuisance liability was still absolute. In 1708 Sir John Holt C.J. in *Tenant v. Goldwin*¹⁰ treated the flow of filth from a privy as analogous to the escape of cattle from land. Blackburn J. did not intend to make new law¹¹ in *Rylands v. Fletcher*; he made a generalisation which covered the cases of absolute liability which had survived the general "moralisation" of the law in the eighteenth and nineteenth centuries. In the language of Wigmore, these cases of liability without fault "wandered about, unhoused and unshepherded, except for a casual attention, in the pathless fields of jurisprudence, until they

¹⁰ 3 Ld.Raym. 1069, 1092.

¹¹ This was Blackburn J.'s own opinion: "I wasted much time in the preparation of the judgment in *Rylands v. Fletcher* if I did not succeed in showing that the law held to govern it had been law for at least 300 years": *Ross v. Fedden* (1872) 26 L.T. 966, at 968.

were met by the master-mind of Mr. Justice Blackburn, who guided them to the safe fold where they have since rested. In a sentence epochal in its consequences this judge co-ordinated them all in their true category."¹² But in fact new law was made, for it was a new doctrine that the occupier was liable for the defaults of an independent contractor and (as later decisions showed) of anyone except a stranger.

(ii) *Social*

Some attention has also been given to the social or economic background of the case. No doubt the decision (like all decisions) is to some extent rooted in the society which gave it birth,¹³ but there seems no foundation for the belief that Sir Colin Blackburn and the ten other judges who took part in the three stages of the case were influenced, consciously or unconsciously, by a desire to propitiate the dominant landed gentry of the time, who, it is alleged, regarded the right of exclusive dominion over land as paramount to its commercial exploitation.¹⁴

Relationship to nuisance

Salmond regarded the rule in *Rylands v. Fletcher* as merely one branch of the law of nuisance. In earlier editions of this work the discussion of that rule was to be found imbedded in the midst of the chapter on nuisance. Undoubtedly a great many cases in which the rule in *Rylands v. Fletcher* is applied involve nuisance situations, but "nuisance is not only different in its historical origin, but in its legal character and many of its incidents and applications."¹⁵ The rule in *Rylands v. Fletcher* covers a wider field than that covered by nuisance. For private nuisance

¹² "Responsibility for Tortious Acts" (1894) 7 Harv.L.Rev. 441, 454. But Lord Simon has said that "it appears to me logically unnecessary and historically incorrect to refer to all these instances as deduced from one common principle": *Read v. Lyons* [1947] A.C. at 167.

¹³ See the shrewd comment from Texas cited below, § 123, n. 54.

¹⁴ This was the view put forward by Bohlen (*Studies*, pp. 368-369), but effectively criticised by Molloy, "*Fletcher v. Rylands*—A Re-Examination of Juristic Origins" (1941) 9 U.Chi.L.Rev. 266 (a neglected article, which contains much interesting material). It might be added that Rylands and Horrocks had developed their mill and reservoir with the consent of their lessor, the Earl of Wilton—a member of the family of Grosvenor, famous not only for the extent of their acres, but also for the efficient commercial development of them.

¹⁵ *Northwestern Utilities v. London Guarantee Co.* [1936] A.C. 108, 119, *per* Lord Wright. *Cf. Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880, 903.

is limited according to the more usual view to acts interfering with the enjoyment of land and commonly involves the creation of a continuous condition causing or threatening repeated injury.¹⁶ The rule in *Rylands v. Fletcher* is probably not so limited. On the other hand many nuisances, e.g., noise and obstruction of light, are outside the rule in *Rylands v. Fletcher*. Winfield well said¹⁷ that nuisance and the rule in *Rylands v. Fletcher* "are related to one another as intersecting circles, not as the segment of a circle to the circle itself." There are many other differences between the two.¹⁸

Trespass

Some eminent judges, e.g., Bramwell B.,¹⁹ Stirling L.J.,²⁰ Parker J.,²¹ and Astbury J.,²² have regarded the action under the rule in *Rylands v. Fletcher* as in the nature of trespass, the underlying idea being that a man releases some force brought by him onto his own property, which gets beyond his control and injures his neighbour. But clearly in most cases under the rule the injury done to the plaintiff is consequential and not direct.

Negligence

Other writers²³ have regarded the rule in *Rylands v. Fletcher* as a branch of the law of negligence. But it is perfectly clear that a man may be liable under the rule even though neither he nor anyone else has been guilty of any negligence in allowing the escape.²⁴ It is equally clear that he may be liable though he has done no unlawful act in introducing the dangerous thing onto his land. There are many instances in the reports of defendants who have been held liable under the rule in *Rylands v. Fletcher* although their minds were not negligent. In practice the

¹⁶ Above, § 22.

¹⁷ "Nuisance as a Tort" (1930) 4 Camb.L.J. 189, at 195.

¹⁸ These have been well summarised by Winfield, *Tort*, pp. 463-467.

¹⁹ *Fletcher v. Rylands* (1865) 3 H. & C. 774, 789; *Carstairs v. Taylor* (1871) L.R. 6 Ex. 217, 221; *Nichols v. Marsland* (1875) L.R. 10 Ex. 255, 260.

²⁰ *Foster v. Warblington U.C.* [1906] 1 K.B. 648, 672.

²¹ *Jones v. Llanrwst U.C.* [1911] 1 Ch. 393, 403.

²² *Hoare & Co. v. McAlpine* [1923] 1 Ch. 167, 175.

²³ Thayer, "Liability without Fault" (1916) 29 Harv.L.Rev. 801. See also Stallybrass in the 10th ed., s. 145.

²⁴ See *Att.-Gen. v. Cory Bros.* [1921] 1 A.C. 521, 539, 544. It is no defence that the defendant did not know of the dangerous character of that which he was keeping; it is no defence that there was no reason why he should know: *West v. Bristol Tramways* [1908] 2 K.B. 14, 16.

importance of the distinction can be seen from the fact that if the plaintiff states his claim on the principle of *Rylands v. Fletcher* he need only plead the escape; whereas if he states his claim in negligence he must plead and prove negligence. Nevertheless, it may be possible to regard these cases as a special instance of negligence, where the law exacts a degree of diligence so high as to amount practically to a guarantee of safety.²⁵ The principle behind all these cases is that if a man takes a risk, which he ought not to take without also taking upon his own shoulders the consequences of that risk, he must pay for any damage that ensues.²⁶

§ 122. An Escape Necessary

The scope of the doctrine laid down in the classic judgment of Blackburn J. was much discussed by the House of Lords in *Read v. J. Lyons & Co., Ltd.*²⁷ The appellant was injured by an explosion in the respondents' munitions factory while performing her duties as inspector of the Ministry of Supply. She neither alleged nor proved negligence on the respondents' part. "Boldly she averred and by her counsel maintained the averment before this House, that he who lawfully carries on the business of manufacturing high explosive shells upon his premises, is, without proof of negligence, liable to any person lawfully upon those premises who suffers damage by reason of an explosion. For, she said, high explosive shells are 'dangerous things' and the respondents knew it."²⁸ Her contention was unanimously

²⁵ *Donoghue v. Stevenson* [1932] A.C. 562, 611-612; *Haseldine v. Daw & Sons, Ltd.* [1941] 2 K.B. 343, 355-356.

²⁶ On this statement by Stallybrass, Harper and James, *Torts*, Vol. ii, p. 801, comment as follows: "This appears to be altogether sound. It means that the enterprise, involving as it does unusual hazards, considering the time and locality, must pay its way . . . not because the defendant has not acted as a reasonably prudent man by living up to the minimum standard of socially desirable conduct, but by reason of a social policy in allocating the risk of loss irrespective of fault."

²⁷ [1947] A.C. 146. "Nothing could be simpler than the facts in this appeal; nothing more far-reaching than the discussion of fundamental legal principles to which it has given rise": Lord Macmillan at 170.

²⁸ *Ibid.*, per Lord Simonds at 178. In the Court of Appeal her case was based not only on the rule in *Rylands v. Fletcher* but also on the absolute liability for the "miscarriage of ultra-hazardous activities carefully carried on" formulated in 3 *Restatement of the Law of Torts*, s. 519. The court held English law did not recognise this doctrine: "our law of torts is concerned not with activities but with acts"—[1945] K.B. 212, at 228, per Scott L.J. (The whole judgment is of great interest; the argument of Paull K.C. for the plaintiff also deserves careful study.)

repudiated. That high explosive shells were dangerous things was admitted, but "the strict liability recognised by this House to exist in *Rylands v. Fletcher* is conditioned by two elements which I may call the condition of 'escape' from the land of something likely to do mischief if it escapes, and the condition of 'non-natural use' of the land."²⁹ The House reserved its opinion on the question of non-natural use,³⁰ for the case could be disposed of by denying that there had been an escape. "Escape, for the purpose of applying the proposition in *Rylands v. Fletcher*, means escape from a place which the defendant has occupation of or control over land³¹ to a place which is outside his occupation or control,"³² and this of course the plaintiff was unable to prove.

It has been said³³ that it would lead to strange results if the respondents were held liable if the person injured was just outside their premises but not if he was just within them. But the distinction between the protection afforded by the law of nuisance on the one hand and by the law of negligence on the other is sharp and familiar: "Matters happening within one's own bounds are one thing and matters happening outside those bounds are an entirely different thing."³⁴ When the rule in *Rylands v. Fletcher* is looked upon as a principle regulating the duties of neighbouring landowners the decision in *Read v. Lyons* "is in harmony with a strictly analogous branch of the law, the law of nuisance, in which also negligence is not a necessary ingredient in the case. . . . There the liability is strict, and there he alone has a lawful claim

²⁹ *Ibid.*, per Lord Simon at 167. The need for an "escape" was re-emphasised in *J. Doltis, Ltd. v. Isaac Braithwaite & Sons, Ltd.* [1957] 1 Lloyd's Rep. 522.

³⁰ For this, see below, § 123.

³¹ So it does not include escape from a ship: *The Wagon Mound (No. 2)* [1963] 1 Lloyd's Rep. 402.

³² Lord Simon at 168. Lord Macmillan (at 173) puts it even more narrowly: "there must be the escape of something from one man's close to another man's close," and Lord Simonds (at 181) seems to agree with him.

³³ *Read v. Lyons* [1944] 2 All E.R. 98, 105, per Cassels J. Cf. Lord Porter in [1947] A.C. at 177. Stallybrass did not think it strange: 60 L.Q.R. 208. On the supposed illogicality of it see some valuable remarks in Lloyd, "Reason and Logic in the Common Law" (1948) 64 L.Q.R. 468, 476.

³⁴ *Ibid.* at 186, per Lord Uthwatt.

who has suffered an invasion of some proprietary or other interest in land.”³⁵

Personal injuries

These observations provide the clue to the problem whether damages for personal injuries may be recovered under the rule in *Rylands v. Fletcher*. Some observations of Lord Macmillan in *Read v. Lyons*³⁶ have sometimes been interpreted to mean that damages for personal injuries can never be recovered unless negligence is proved. This is not so. Those observations must (like all other judicial statements) be read in the light of the facts of the particular case and mean no more than this: that a non-occupier must prove negligence before he can recover for personal injuries. As Lord Macmillan himself said of *Rylands v. Fletcher*, “its congeners are trespass and nuisance,”³⁷ and neither in nuisance nor in cattle-trespass can a non-occupier recover for personal injuries. But just as in each of these cases of strict liability the law permits an occupier to recover for his personal injuries,³⁸ so it permits him to do so if he brings suit under that form of strict liability known as the rule in *Rylands v. Fletcher*. The distinction turns on the character of the claimant and not on the character of his injuries. Blackburn J. himself allowed an occupier to recover for damage to his chattels under the rule in *Rylands v. Fletcher*,³⁹ and both on principle and on authority the same conclusion would follow in the case of personal injuries. On principle, for it would be absurd to suppose that the law allowed (as it does) an occupier who had been trampled upon by straying cattle to recover without proof of negligence,⁴⁰ but not one who had been submerged under thousands of gallons of escaping water or oil. On authority, because it is not open

³⁵ *Ibid.* at 182–183, per Lord Simonds. As a learned author has remarked: “What was novel in *Rylands v. Fletcher*, or at least clearly decided for the first time, was that as between adjacent occupiers an isolated escape is actionable”: Newark, “The Boundaries of Nuisance” (1949) 65 L.Q.R. 480, 488.

³⁶ [1947] A.C. at 173. Cf. Lord Simon at 168–169.

³⁷ [1947] A.C. at 173.

³⁸ See above, § 23, below, § 138

³⁹ *Jones v. Festiniog Ry.* (1868) L.R. 3 Q.B. 793. See also *Halsey v. Esso Petroleum Co., Ltd.* [1961] 1 W.L.R. 683.

⁴⁰ *Wormald v. Cole* [1954] 1 Q.B. 614.

to the Court of Appeal in view of its own previous decision in *Hale v. Jennings Bros.*⁴¹ to hold that it does not.⁴²

§ 123. Non-natural Use of Land⁴³

Blackburn J.'s statement of the law was expressly approved in the House of Lords,⁴⁴ but Lord Cairns, probably unconsciously,⁴⁵ laid down another principle,⁴⁶ distinguishing the natural from the non-natural user of land, and holding that in the latter case only was the liability absolute. This is to substitute a different principle from that adopted by Blackburn J. It converts a rigid into a flexible rule, and enables the court by determining what is or is not a natural user of land to give effect to its own view of social and economic needs.⁴⁷ For this very reason no definition of "natural user" is possible or even desirable. Indeed, such a distinction has little in principle to recommend it. What is the natural use of land? Is it natural to build a house on it, or to light a fire?⁴⁸ Almost all use of land involves some alteration of its natural condition, and it seems impossible to say

⁴¹ [1938] 1 All E.R. 579.

⁴² *Perry v. Kendrick's Transport, Ltd.* [1956] 1 W.L.R. 85; *Dunne v. North Western Gas Board* [1964] 2 Q.B. 806. But in *Shiffman v. Order of St. John* [1936] 1 All E.R. 557, and *Aldridge v. Van Patter* [1952] 4 D.L.R. 93, non-occupiers were permitted to recover for personal injuries. For damage to property of a non-occupier, see *Vaughn v. Halifax-Dartmouth Bridge Commission* (1961) 29 D.L.R. (2d) 523.

⁴³ See Stallybrass, "Dangerous Things and Non-Natural User of Land" (1929) 3 Camb.L.J. 376; Newark, "Non-natural User and *Rylands v. Fletcher*" (1961) 24 M.L.R. 557.

⁴⁴ (1868) L.R. 3 H.L. 330, 340. As MacKinnon L.J. noticed ([1945] K.B. 242; cf. Lord du Parc in [1949] C.L.P. 5, and *The Times*, July 8 and 18, 1868), only two Law Lords (Lord Cairns and Lord Cranworth (who died seven days after judgment had been delivered on July 17)) are reported as having been present, although three peers are required to form a quorum in the House of Lords.

⁴⁵ Lord Cairns merely seems to have been attempting to restate in his own words Blackburn J.'s point that it was the accumulation or collection by the defendant which was the basis of liability.

⁴⁶ Manisty, Q.C., however, based his argument upon the distinction between ordinary and extraordinary user both in the Exchequer and in the House of Lords: (1865) 3 H. & C. 774; (1868) L.R. 3 H.L. at 336. And Bramwell B. had already taken the same point in *Bamford v. Turnley* (1860) 3 B. & S. 62, 83. But what Blackburn J. had in mind was the distinction between "natural water" and "artificial water," which is not the same as the distinction between ordinary and extraordinary user.

⁴⁷ It has even been said that there are two rules in *Rylands v. Fletcher*: *Porter (J. P.) Co., Ltd. v. Bell* [1955] 1 D.L.R. 62, 66.

⁴⁸ Yes, if it is an ordinary household fire in a grate; *J. Doltis, Ltd. v. Isaac Braithwaite & Sons, Ltd.* [1957] 1 Lloyd's Rep. 522.

how far this alteration may go before the use of land becomes non-natural or extraordinary so as to bring the rule in *Rylands v. Fletcher* into operation. Moreover, if there is one kind of use more natural than another it is the keeping of cattle,⁴⁹ or the building of a privy; yet these are typical instances (given by Blackburn J.) of the application of this rule of strict responsibility. Although such unreal and impracticable distinctions are not creditable to the development of English law there is an abundance of authority in support of this qualification upon the generality of the rule,⁵⁰ in particular the decision of the Privy Council in *Rickards v. Lothian*.⁵¹ Thus it is the natural user of land to bring water into a cistern in a house,⁵² but not industrial water (i.e., water under pressure),⁵³ or water stored in bulk, as in *Rylands v. Fletcher* itself.⁵⁴ So the laying of gas pipes by a landlord for the supply of gas to dwelling-houses owned by him is a natural and not a non-natural use of his property,⁵⁵ and so is wiring for domestic use or for purposes of trade.⁵⁶ But electricity or gas when carried in bulk attracts the principle of *Rylands v. Fletcher*,⁵⁷ as does the collection in a sewer of a large quantity of noxious and inherently dangerous sewage,⁵⁸ or the storage of a motor-vehicle with a tank full of petrol in a garage,⁵⁹ or even

⁴⁹ Even though not indigenous to this country: e.g., Friesian cattle: *Western Silver Fox Ranch v. Ross and Cromarty C.C.*, 1940 S.C. 601.

⁵⁰ See the cases cited in 3 Camb.L.J. 390-397, and add *Howard v. Furness Houlder* [1936] 2 All E.R. 786; *Tilley v. Stevenson* [1939] 4 All E.R. 207; *Hale v. Jennings Bros.* [1938] 1 All E.R. 684; *Eastern Asia Navigation Co. Ltd. v. Fremantle Harbour Trust Commissioners* (1951) 83 C.L.R. 353.

⁵¹ [1913] A.C. 263.

⁵² *Rickards v. Lothian* [1913] A.C. 263; *Crown Diamond Paint Co., Ltd. v. Acadia, Ltd.* [1952] 2 D.L.R. 541.

⁵³ *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.* [1914] 3 K.B. 772. Contrast *Peters v. Prince of Wales Theatre, Ltd.* [1943] K.B. 73.

⁵⁴ "This basis of the English rule is to be found in the meteorological conditions which obtain there. England is a pluvial country, where constant streams and abundant rains make the storage of water unnecessary for ordinary or general purposes. . . . In Texas we have conditions very different from those which obtain in England. . . . The country is almost without streams; and without the storage of water from rainfall in basins constructed for the purpose, or to hold waters pumped from the earth, the great livestock industry of West Texas must perish." : *Turner v. Big Lake Oil Co.* (1936) 128 Tex. 155, 96 S.W. (2d) 221 at 225-226, per Cureton C.J.

⁵⁵ *Miller v. Addie & Son's Collieries*, 1934 S.C. 150.

⁵⁶ *Collingwood v. Home and Colonial Stores* [1936] 3 All E.R. 200.

⁵⁷ *Ibid.*; *Northwestern Utilities v. London Guarantee Co.* [1936] A.C. 108.

⁵⁸ *Smeaton v. Ilford Corporation* [1954] Ch. 450, 472.

⁵⁹ *Musgrove v. Pandelis* [1919] 2 K.B. 43. But is it really a non-natural use of land to build a garage upon it? See *Collingwood v. Home and Colonial Stores* [1936] 3 All E.R. 200, 209; *Read v. J. Lyons & Co., Ltd.* [1947]

with a tank which has been emptied.⁶⁰ It is probably not a non-natural use of land to make munitions on it, at any rate when it is done "at the government's request in time of war for the purpose of helping to defeat the enemy."⁶¹ "Extraordinary," "exceptional," "abnormal," are words that are sometimes used in substitution for "non-natural," and they suggest the true principle underlying the doctrine. In order to fall under the rule in *Rylands v. Fletcher* the use to which the defendant's land is put must be "some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community."⁶² It is a question of fact, subject to a ruling of the judge whether the particular object can be dangerous or the particular use can be non-natural, and in deciding this question all the circumstances of the time and place and practice of mankind must be taken into consideration so that what might be regarded as dangerous or non-natural may vary according to those circumstances.⁶³

§ 124. Dangerous Things

To what "things" does the rule in *Rylands v. Fletcher* apply? Blackburn J.'s language is very wide—"anything likely to do mischief if it escapes." He does not restrict the rule to things likely to escape; or to cases in which the defendant is making use of his land in a way which is fraught with exceptional peril to others. Most things are likely to do mischief if they escape, and it seems that notwithstanding the breadth of Blackburn J.'s language, we must treat the rule as subject to both limitations. Subsequent decisions have equated the expression with "dangerous things."⁶⁴ But, as *du Parcq L.J.*

A.C. 157, 176. And is there not a difference (recognised by the practice of insurance companies) between petrol in the tank of a car and petrol in a separate drum? See Goodhart, 72 L.Q.R. 184. So liability was rightly imposed in *Mulholland and Tedd, Ltd. v. Baker* [1939] 3 All E.R. 253.

⁶⁰ *Perry v. Kendrick's Transport, Ltd.* [1956] 1 W.L.R. 85.

⁶¹ *Read v. Lyons* [1947] A.C. 156, 169-170, 173-174.

⁶² *Rickards v. Lothian* [1913] A.C. 263, 280, *per* Lord Moulton (in *Read v. Lyons* [1947] A.C. 156 Viscount Simon L.C. said (at 169) that Lord Moulton's analysis was "of the first importance").

⁶³ *Read v. Lyons* [1947] A.C. 156, 176, 188.

⁶⁴ See Stallybrass (1929), 8 Camb.L.J. 378 *et seq.*, and *Northwestern Utilities Ltd. v. London Guarantee Co.* [1936] A.C. 106, 118; *Hale v. Jennings Bros.* [1938] 1 All E.R. 579.

pointed out,⁶⁵ Blackburn J. in *Rylands v. Fletcher* was not purporting in his judgment to convey a representative list of extra-hazardous activities—it is not extra-hazardous to keep cows or maintain a privy—but was dealing with things which are harmless to others so long as they are confined to a man's own property. He was not considering the rights of those who are injured by dangerous chattels on premises which they have entered.

Things likely to do mischief

We have seen ⁶⁶ that it is difficult to find a test by which to distinguish those things which are dangerous in themselves. It is not much easier to discover what are the things which are likely to do mischief if they escape. An examination of all the cases in which the rule in *Rylands v. Fletcher* has been held to apply does not carry us very far. Chemicals, fire and electricity are always treated as falling under the rule; water, trees, chimney stacks, motor-cars and unloaded guns sometimes do and sometimes do not come under it.⁶⁷ In *Firth v. Bowling Iron Co.*⁶⁸ decayed wire rope was held to impose a liability under the rule, though it certainly could not be considered likely to escape, and in *Hoare v. McAlpine* ⁶⁹ vibrations were held to come under the rule, though it is difficult to regard them as things. In *Att.-Gen. v. Corke*,⁷⁰ it was held that the principle which underlies the decision in *Rylands v. Fletcher* afforded a basis upon which to grant an injunction against the owner of a disused brickfield who licensed caravan dwellers to dwell upon it who committed nuisances upon adjoining land. Caravan dwellers are certainly likely to escape and to do mischief if they do,⁷¹ but they are not things, and it would seem that the mischief which they do is to be imputed to a *novus actus interveniens*. Even if we regard this extension of the law as unjustifiable, it is submitted that we are driven to the conclusion that the principle applies to anything which anyone brings,

⁶⁵ *Read v. Lyons & Co.* [1945] K.B. at 247.

⁶⁶ Above, § 118.

⁶⁷ See above, § 123.

⁶⁸ (1878) 8 C.P.D. 254.

⁶⁹ [1923] 1 Ch. 167. Not followed: *Barrette v. Franki Compressed Pile Co.* [1955] 2 D.L.R. 665.

⁷⁰ [1933] Ch. 89. Cf. *Greenwell v. Prison Commissioners* (1951) C.L.C. 6592.

⁷¹ An injunction was obtained to restrain the creation of a nuisance under s. 100 of the Public Health Act, 1936, in *Cheltenham R.D.C. v. Ware* [1953] C.P.L. 662 (gypsy encampment).

collects and keeps upon his land, otherwise than in the course of the ordinary user of the land, which in the circumstances of the case is likely to cause an undue risk of mischief to others. In some cases ⁷² a confusion has crept in by which the distinction between dangerous and non-dangerous things has been confounded with the distinction between non-natural and natural user of land. It is submitted that the two questions, though related, are distinct. Water, filth, and many other so-called *Rylands v. Fletcher* objects are perfectly usual objects. In order that liability under the rule may be imposed it is necessary both that the user of the land should be extraordinary and that the object should in the circumstances of the particular case be dangerous.

User of the highway

There seems to be one exception to the requirement that the dangerous thing shall have escaped from premises in the defendant's occupation or control. He who brings any dangerous thing upon the highway, or interferes with any dangerous thing already there, with the result that it does damage on adjoining property, is liable without proof of negligence, unless he can prove that the accident was due to the act of a stranger or to the act of God. Thus in *Midwood v. Mayor of Manchester* ⁷³ the corporation of Manchester was held liable, apart from any proof of negligence, for an explosion and fire caused by the escape into the plaintiff's house from the adjoining roadway of an inflammable gas created by the fusing of a defective electric cable there laid down by the defendant, and the resulting volatilisation of the bitumen in which the cable was enclosed. In *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.* ⁷⁴ the Court of Appeal, professing to follow *Midwood v. Mayor of Manchester*, ⁷⁵ went considerably further by holding that the rule in *Rylands v. Fletcher* was applicable as between two companies using a highway as licensees under statutory authority for the transmission of water and electricity respectively; and the water company was held liable for damage done to the electric cables of the other company by the escape of water from a broken main. ⁷⁶

⁷² They are discussed in (1929) 3 Camb.L.J. at 395.

⁷³ [1905] 2 K.B. 597.

⁷⁴ [1914] 3 K.B. 772.

⁷⁵ [1905] 2 K.B. 597.

⁷⁶ Lord Sumner said (at p. 779): "I am satisfied that *Rylands v. Fletcher* is not limited to the case of adjacent freeholders. I shall not attempt to

Who is responsible?

In *St. Anne's Well Brewery Co. v. Roberts*⁷⁷ it was held that the principle in *Rylands v. Fletcher* does not affect the exemption from liability of an owner who is out of possession at the time that the injury takes place. Scrutton L.J. treated it as only applicable to occupiers, but this was an unnecessarily wide generalisation for the purposes of the case and it is submitted that anyone who introduces the mischievous thing and has control of it at the time of the escape might be made liable under the rule.⁷⁸ Liability is dependent upon control.

§ 125. Things Naturally on Land

The rule in *Rylands v. Fletcher* does not apply to the land itself, or to things which are the product of natural forces operating in geological time,⁷⁹ such as outcrops of rock.⁸⁰ It applies only to things which are brought and kept upon the defendant's land and is inapplicable to things which are naturally there, howsoever dangerous they may be—e.g., noxious weeds, vermin, or water.⁸¹ So far from being absolutely liable for the escape of these things, the occupier of the land was not originally under any duty of care to prevent their escape.⁸² From such dangers every man had to protect himself, unless statute gave a remedy.⁸³ Thus in *Giles v. Walker*⁸⁴ it was held that the occupier

show how far it extends. It extends as far as this case, and that is enough for the present purpose." The H.L. in *Read v. Lyons* [1947] A.C. 156 reserved its opinion on these cases: their principle is unlikely to be extended: *Dunne v. North Western Gas Board* [1964] 2 Q.B. 806.

⁷⁷ (1928) 140 L.T. 1. See *Stallybrass* in 45 L.Q.R. 118.

⁷⁸ *Rairham Chemical Works v. Belvedere Fish Guano Co.* [1921] 2 A.C. 465, 479.

⁷⁹ *Healy v. Bray U.D.C.* [1963] Ir.Jur.Rep. 9, 15.

⁸⁰ *Pontardawe R.D.C. v. Moore-Gwynn* [1929] 1 Ch. 656. It would be different if the rocks fell because they had been quarried.

⁸¹ *Bartlett v. Tottenham* [1932] 1 Ch. 114, 131; *Read v. Lyons* [1947] A.C. 156, 166. See above, § 23.

⁸² *Neath R.D.C. v. Williams* [1951] 1 K.B. 115, 122, *per* Lord Goddard C.J. See Goodhart, "Things Naturally on the Land" (1930) 4 Camb.L.J. 13; *Essays*, p. 151; Noel, "Nuisances from Land in its Natural Condition" (1943) 56 Harv.L.Rev. 772; Wedderburn, Note, [1958] C.L.J. 32.

⁸³ As it very well may. The Minister of Agriculture has wide powers to prevent anti-social conduct which may hinder food production: see, e.g., the Weeds Act, 1959.

⁸⁴ (1890) 24 Q.B.D. 656. But the authority of this decision has been doubted by the Court of Appeal: *Davey v. Harrow Corporation* [1958] 1 Q.B. 60, in which it was said that there may be liability in nuisance for trees

of land was not liable when he ploughed up forest land and in consequence a large crop of thistles sprang up and the thistledown was blown onto the neighbouring land.⁸⁵ But today he might be liable in nuisance.

Liability for artificial accumulation

A person is liable, however, even for the escape of things naturally on his land, if he has artificially accumulated them there so that their escape does more mischief than it would otherwise have done. If he collects in a reservoir the rain-water that falls upon his land, he is no less responsible for its escape than if he had brought the water in pipes from elsewhere. The question then arises: what is the position if a man by altering the natural state of his land unintentionally causes noxious things to accumulate? To this it is impossible to give a definite answer. In fact this was the position in *Giles v. Walker*,⁸⁶ for there the defendant had caused the growth of the thistles by bringing into cultivation what had hitherto been forest land. Again, we must remember that Blackburn J. in enunciating the rule limited it to "the person who for his own purposes" brings the thing onto the land. These considerations point to the rule in *Rylands v. Fletcher* not being applicable unless the defendant has purposely accumulated the noxious things on his land. Perhaps the decision in *Giles v. Walker* can be explained on the ground that the defendant was only using his land in the ordinary way.⁸⁷

Or if escape actively caused

Although a person is not responsible for *allowing* the escape of things which are naturally on his land, he is responsible for *causing* their escape. He is not entitled to relieve his own land of a burden by casting it upon the land of his neighbour. Thus

naturally on the land and in *Morgan v. Kyatt* [1964] 1 W.L.R. 475 the Judicial Committee said (but not by way of decision) that *Davey v. Harrow Corporation* was correctly decided. See Goodhart, Note, 80 L.Q.R. 306.

⁸⁵ It has been said that the decision should have been different because the defendant had interfered with the natural condition of the land, but it is hard to see why he should be blamed for seeking to improve waste land.

⁸⁶ (1890) 24 Q.B.D. 656.

⁸⁷ Or: "It may be that the court was disinclined to regard thistledown as sufficiently noxious to be dignified as a nuisance, and in 1890 agriculture was perhaps the least regarded of British industries": *Davey v. Harrow Corporation* [1968] 1 Q.B. 60, at 72, *per curiam*.

he is responsible for the escape of water from his land, if the escape is due to some embankment, channel or other artificial structure made or maintained by him there, or to any other alteration in the natural condition of his land.⁸⁸ But this does not mean that an occupier may never lawfully remove from his land an embankment or other artificial structure which serves as a protection to the adjoining land of his neighbour against the natural flow of flood-water. In the absence of contract, grant, prescription or other sufficient source, there is no obligation to maintain in existence for the benefit of his neighbour any such *de facto* protection against flood-water.⁸⁹ An exception to the general principle that a person is liable for causing the escape of water from his land into that of his neighbour was established in the case of mine-owners in *Smith v. Kenrick*,⁹⁰ which settled that no action will lie for the escape of water by natural gravitation into the plaintiff's mine, if this escape is caused merely by the working of the defendant's mine in the ordinary manner.

Preventing entrance of dangerous things

The act of preventing the entrance of flood-water is lawful, even though the known and necessary consequence is to cast that water upon the land of one's neighbour. Therefore a man may embank his land against floods, regardless of the effect upon adjoining lands.⁹¹ He is not bound to receive flood-water upon his land, as he is bound to receive water that confines itself to the channel of a stream. This being so, it can make no difference whether the protective embankment is actually on the boundary of the defendant's land, or is inside that boundary, so long as its effect is merely to prevent the flow of

⁸⁸ *Whalley v. Lancs. and Yorks. Ry.* (1884) 13 Q.B.D. 131.

⁸⁹ *Thomas & Evans, Ltd. v. Mid-Rhondda Co-operative Society* [1941] 1 K.B. 381, 391.

⁹⁰ (1849) 7 C.B. 515. See above, § 121.

⁹¹ *Lagan Navigation Co. v. Lambeg Bleaching Co.* [1927] A.C. 226. So also in *Greyvensteyn v. Hattingh* [1911] A.C. 355 it was held lawful to drive back a swarm of locusts from entering the defendant's land, even though they were thereby caused to go or remain upon the neighbouring land of the plaintiff. Presumably, also, it is not actionable to drive mischievous animals, e.g., birds, vermin or trespassing cattle, off one's land, even though the natural consequence is that they enter upon the land of other persons, provided that they are not directly driven upon that land so as to constitute a trespass. See also above, § 11.

flood-water across his land.⁹² If, however, the defendant so embanks his land as to remove from it flood-water which has already obtained entrance, and to cast it upon adjoining land of the plaintiff to which it would not have had access had it not first come upon the defendant's land, there is doubtless a good cause of action.

§ 126. First Exception: Consent of the Plaintiff

The rule in *Rylands v. Fletcher* is subject to a number of important exceptions, there being particular classes of cases in which the occupier is either not liable at all, or not liable in the absence of negligence. When stated without the exceptions, it is a rule of "absolute liability, but there are so many exceptions to it that it is doubtful whether there is much of the rule left."⁹³

The rule in *Rylands v. Fletcher* is not applicable to the escape of things brought or kept upon his premises by the defendant with the consent of the plaintiff. In such cases the defendant is not liable except for negligence.⁹⁴ Although not so limited,⁹⁵ this principle finds its chief application in those cases in which the different storeys of a building are in the occupation of different persons, and the occupant of a lower storey complains of the damage done by the escape of water from an upper storey. Whether this water is rain-water collected from the roof, or water supplied *ab extra* in pipes, it is settled law that there is no liability for any such escape in the absence of proved negligence on the part of the upper occupant.⁹⁶ For in such cases the water has been collected or brought there for the mutual benefit and with the express or implied consent of both parties; there is therefore no sufficient reason why the risk of accident should lie upon the upper rather than upon the lower occupant, and the only duty is one of reasonable care.⁹⁷

⁹² *Marriage v. East Norfolk Catchment Board* [1949] 2 K.B. 456.

⁹³ *St. Anne's Well Brewery Co. v. Roberts* (1928) 140 L.T. 1, at 6 per Scrutton L.J.

⁹⁴ *Att.-Gen. v. Cory Bros. & Co.* [1921] 1 A.C. 521, 539.

⁹⁵ *Kiddle v. City Business Properties Ltd.* [1942] 1 K.B. 269, 274.

⁹⁶ *Rickards v. Lothian* [1913] A.C. 263; *Prosser (A.) & Son, Ltd. v. Levy* [1955] 1 W.L.R. 1224.

⁹⁷ The preceding five sentences were cited with approval by Jones J. in *Akerib v. Booth Ltd.* [1960] 1 W.L.R. 454, 458 (reversed on another ground [1961] 1 W.L.R. 367).

The rules governing the position of adjoining occupiers whose holdings are entirely independent the one of the other are not relevant. The same principle would doubtless apply to an escape of gas or any other deleterious substance⁹⁸ which is there with the consent and for the mutual benefit of the occupants. In most of these cases the benefit of the water or other thing is common to both parties, but the mutual benefit, though an important element in showing that there was consent, is not decisive. The exception really depends upon consent, upon the fact that the defendant has taken the premises as they are and must put up with the consequences.⁹⁹

§ 127. Second Exception: Default of the Plaintiff

The rule in *Rylands v. Fletcher* is not applicable where the escape was owing to the plaintiff's default.¹ Again, if the plaintiff is a trespasser on land he cannot complain of the things he may find there, nor if he goes out of his way to encounter danger can he blame the defendant for any harm he may suffer.² So also where the damage would not have occurred but for some special or non-natural user of the plaintiff's property the defendant will not be liable under this rule.³

§ 128. Third Exception: The Act of a Stranger

The rule in *Rylands v. Fletcher* is not applicable to damage done by the act of a stranger. Thus if a trespasser lights a fire on my land I am not liable if it burns my neighbour's property,⁴ unless with knowledge or presumed knowledge of its existence I have failed to extinguish it within a reasonable time.⁵ So in

⁹⁸ *Collingwood v. Home and Colonial Stores* [1936] 3 All E.R. 200 (domestic electric wiring).

⁹⁹ *Prosser (A.) & Son, Ltd. v. Levy* [1955] 1 W.L.R. 1224.

¹ *Fletcher v. Rylands* (1886) L.R. 1 Ex. 265, 279-280.

² *Postmaster-General v. Liverpool Corporation* [1923] A.C. 587. In *Miles v. Forest Rock Granite Co.* (1918) 34 T.L.R. 500, the Court of Appeal appear to have held that a plaintiff who persisted in walking along a highway in spite of warnings of a coming explosion from blasting operations and was injured by a piece of stone was not the less able to recover. *Sed quare.*

³ *Eastern and South African Telegraph Co. v. Cape Town Tramways* [1902] A.C. 381; *Western Silver Fox Ranch v. Ross and Cromarty County Council*, 1940 S.C. 601.

⁴ *Balfour v. Barty-King* [1957] 1 Q.B. 496, 504.

⁵ *Hargrave v. Goldman* [1964] A.L.R. 377.

*Box v. Jubb*⁶ the defendants were held not responsible for damage done through an overflow from their reservoir, when that overflow was caused by an act of a third person who emptied his own reservoir into the stream which fed that of the defendant. So in *Rickards v. Lothian*⁷ it was held by the Judicial Committee on this ground that the occupier of an upper storey of a block of flats was not liable for damage done to the occupier of a lower storey by the escape of water from a lavatory, when the escape was caused by the malicious act of a third person. In this context malicious means conscious or deliberate.⁸ The onus is on the defendant to show affirmatively that the escape was due to the deliberate or conscious act of a stranger over whom he had no control and against whose acts he could not reasonably be expected to have taken precautions.⁹

But it should be noted that an occupier may be liable in negligence for the acts of strangers even though he escapes liability under the rule in *Rylands v. Fletcher*. When the stranger's act is of a kind which ought to have been anticipated and guarded against the occupier will be liable for a failure to take reasonable care. Thus in *Northwestern Utilities v. London Guarantee and Accident Co.*¹⁰ the appellants, who were carrying gas at high pressure under the streets of Edmonton, Alberta, were held liable when an hotel insured by the respondents was destroyed owing to the escape of gas due to a leak caused by the operations of third persons, since those operations were conspicuous and ought to have been foreseen and guarded against. But "They left it all to chance," and were thereby guilty of negligence.¹¹

It does not clearly appear, however, who is a stranger within the meaning of this rule. The term certainly includes a trespasser,

⁶ (1879) 4 Ex.D. 76.

⁷ [1913] A.C. 263.

⁸ *Northwestern Utilities v. London Guarantee Co.* [1936] A.C. 108, 119. Cf. *Dominion Natural Gas Co. v. Collins* [1909] A.C. 640, 647 ("the conscious act of another volition"; Lord Dunedin); *Smith v. G. W. Ry.* (1926) 42 T.L.R. 391; *Philco Radio, Ltd. v. Spurling* [1949] 2 All E.R. 882; *Perry v. Kendrick's Transport, Ltd.* [1956] 1 W.L.R. 85, 90.

⁹ *Northwestern Utilities v. London Guarantee Co.* [1936] A.C. 106, 120; *Prosser (A.) & Sons, Ltd. v. Levy* [1955] 1 W.L.R. 1224.

¹⁰ [1936] A.C. 106. See the article by Lord Wright (who delivered the judgment of the Judicial Committee) in his *Legal Essays*, Chap. 5, and Goodhart, "The Third Man" [1951] C.L.P. 177. Dr. Goodhart argues that the act of a third party should be no defence.

¹¹ *Shell-Mex and B.P., Ltd. v. Belfast Corporation* [1952] N.I. 72 is a similar

and also any person who, without entering on the defendant's premises at all, wrongfully and without the defendant's authority causes the escape of dangerous things from those premises.¹² It is equally clear that the term stranger does not include any person employed or authorised by the defendant to deal in any way with dangerous things on his land; for the acts of such a person, even though he is an independent contractor, and even though he acts in excess or disregard of his authority, the occupier is vicariously liable.¹³ But what shall be said of persons lawfully upon the defendant's land with his permission, but without authority to bring upon it, or to deal with, dangerous things—for example, the members of his family, his servants, his guests, or licensees permitted to use the land? It is submitted that the occupier is liable for the acts of all such persons in bringing or keeping dangerous things on the premises, or in meddling with such things already on the premises¹⁴ unless it can be said that in all the circumstances the occupier had no control over the activities of the person in question.¹⁵

§ 129. Fourth Exception: The Act of God

The rule in *Rylands v. Fletcher* is not applicable to damage caused by the act of God. The authority for this limitation, the possibility of which was recognised by Blackburn J. himself in his judgment,¹⁶ is the decision of the Court of Appeal in *Nichols v. Marsland*.¹⁷ The defendant was in possession of certain artificial pools formed by damming a natural stream. The embankments and weirs were well and carefully constructed and were adequate for all ordinary occasions. A very violent storm, however—described by witnesses as the heaviest within human

¹² *Box v. Jubb* (1879) 4 Ex.D. 76. It also includes a servant acting in a place to which he is forbidden access: *Stevens v. Woodward* (1881) 6 Q.B.D. 318, 321.

¹³ *Hale v. Jennings Bros.* [1938] 1 All E.R. 579, 583; *Balfour v. Barty-King* [1957] 1 Q.B. 496, 504.

¹⁴ This may be inferred by analogy from such cases as *Beaulieu v. Finglam* (1401) Y.B. 2 Hen. IV, f. 18, pl. 5, and *Lawrence v. Jenkins* (1873) L.R. 8 Q.B. 274. But see *Whitmores, Ltd. v. Stanford* [1909] 1 Ch. 427, 438.

¹⁵ *Perry v. Kendrick's Transport, Ltd.* [1956] 1 W.L.R. 85, 90; *Behrens v. Bertram Mills Circus, Ltd.* [1957] 2 Q.B. 1, 22.

¹⁶ *Fletcher v. Rylands* (1866) L.R. 1 Ex. at 280

¹⁷ (1876) 2 Ex.D. 1. See the criticism of this case by Goodhart, "The Third Man" [1951] C.L.P. 177, 178-182.

memory—broke down the embankments, and the rush of water down the stream carried away certain bridges, in respect of which damage the action was brought. It was held, notwithstanding *Rylands v. Fletcher*, that the defendant was not liable, inasmuch as the jury had found that there was no negligence on the part of anyone and that the accident was due directly to the act of God. In later cases it has been doubted whether heavy rainfalls in the Rhondda Valley,¹⁸ or in Scotland,¹⁹ or a heavy snowstorm in England,²⁰ could be said to be acts of God. But a fire caused by lightning in Western Australia was not caused by the defendant: "It came there from the skies."²¹

Nichols v. Marsland is, it is believed, the only reported case in which the act of God proved successful as a defence to an action under the rule in *Rylands v. Fletcher*. Although the exception is therefore not one of great practical importance, it may be helpful to ascertain precisely what is meant by the term act of God, as used in this connection. Although it has been said²² that this untheological expression is well understood by lawyers, there has been great difference of opinion upon the meaning to be given to the phrase. It seems clear that the defence of act of God is distinct from inevitable accident,²³ although it may be merely a species of that larger genus.²⁴ It seems fairly clear also that in order that an accident may be an act of God it must have resulted directly from natural causes without human intervention.²⁵ Thus, if a ship is driven ashore by a tempest, this is the act of God; but if it is run ashore during a fog by a mistake, however inevitable, on the part of the captain, this is the act of man.²⁶ It is true that in most cases human and natural agency co-operate to produce the result, but the

¹⁸ *Att.-Gen. v. Cory Bros.* (1919) 35 T.L.R. 570, 574. Cf. Lord Haldane in [1921] 1 A.C. 521, 536. But see Lord Wright in *Sedleigh-Denfield's case* [1940] A.C. 880, 889 (heavy rain at Mill Hill).

¹⁹ *Greenock Corporation v. Caledonian Ry.* [1917] A.C. 556.

²⁰ *Fenwick v. Schmalz* (1868) L.R. 3 C.P. 313, 316; *Slater v. Worthington's Cash Stores* [1941] 1 K.B. 488, 492.

²¹ *Hargrave v. Goldman* [1964] A.L.R. 377, 386.

²² *Great Western Ry. v. Owners of S.S. Mostyn* [1928] A.C. 57, 93.

²³ *Trent and Mersey Navigation Co. v. Wood* (1785) 4 Doug. 287, 290.

²⁴ *Nugent v. Smith* (1876) 1 C.P.D. 423, 435; *Makin, Ltd. v. L. & N.E. Ry.* [1943] K.B. 467, 475, 478.

²⁵ *Nugent v. Smith* (1876) 1 C.P.D. 423, 444.

²⁶ *Liver Alkali Co. v. Johnson* (1874) L.R. 9 Ex. 338.

immediate and direct cause is alone to be looked at in determining whether the act is that of God or man. When a ship is cast away in a tempest, this would not have happened but for the act of the owner in sending her to sea, but the loss is the act of God for all that.

Act of God and negligence

It is at this point that we are faced with the main difficulty in the defence of act of God. It is perfectly clear that it will not always be a defence to show that the damage was caused by a natural cause without human intervention. Shall we therefore limit further the definition of act of God? This is what Lord Westbury L.C. did in *Tennent v. Earl of Glasgow*²⁷ when he spoke of *damnum fatale* occurrences (the Scottish equivalent of act of God) as "circumstances which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility."²⁸ But it is submitted that these definitions contain the answer to two distinct questions, namely, what is an act of God? and, when will an act of God relieve from liability? It is submitted that all natural agencies, as opposed to human activities, constitute acts of God, and not merely those which attain an extraordinary degree of violence or are of very unusual occurrence. The distinction is one of kind and not one of degree.²⁹ The violence or rarity of the event is relevant only in considering whether it could or could not have been prevented by reasonable care; if it could not, then it is an act of God which will relieve from liability, howsoever trivial or common its cause may have been.³⁰ If this be correct then the unpredictable nature of the occurrence will go only to show that the act of God in question was one which the defendant was under no duty to foresee or provide against.³¹ It is only in such a case that the

²⁷ (1864) 2 M.(H.L.) 22.

²⁸ Approved in *Greenock Corporation v. Caledonian Ry.* [1917] A.C. 556, 572, 576, 580.

²⁹ In *Makin Ltd. v. L. & N. E. Ry.* [1943] K.B. 467, 478, Goddard L.J. said: "Every act of God which causes injury may be called an accident, although not every accident is an act of God." If the statement in the text is correct, this needs qualification. A fall of snow is an act of God but it is not an accident: it is an incident rather than an accident.

³⁰ *Nugent v. Smith* (1876) 1 C.P.D. 423.

³¹ Thus it is submitted that a man's death from natural causes is always an act of God (*Constantine (Joseph) S.S. Line v. Imperial Smelting Corporation* [1942] A.C. 154, 202), but his death will only relieve from

act of God will provide a defence.³² Whether there is a duty to take precautions against extraordinary events depends on the facts in each case. So Bramwell B., speaking of an extraordinary storm, said ³³: "We call it extraordinary, but in truth it is not an extraordinary storm which happens once in a century, or in fifty or twenty years; on the contrary, it would be extraordinary if it did not happen. There is a French saying 'that there is nothing so certain as that which is unexpected.' In like manner, there is nothing so certain as that something extraordinary will happen now and then." This seems to be a suitable guide to decision in a novel case, although it has been powerfully argued that the duty of protection imposed by *Rylands v. Fletcher* should not be limited to foreseeable events, otherwise there would be no difference between strict liability and negligence.³⁴

§ 130. Fifth Exception: Statutory Authority

The rule in *Rylands v. Fletcher* may not be applicable where the defendant has acted in pursuance of special statutory authority in placing and maintaining the dangerous thing on the land from which it escaped.³⁵ It has sometimes been said that a local authority exercising statutory duties (e.g., of sewage disposal) is altogether outside the rule in *Rylands v. Fletcher*.³⁶ It seems, however, that the better view is that a local authority or other body exercising statutory powers or duties is within the scope of the rule unless the statute expressly or impliedly exempts it from the liability to which it would otherwise be subject—and it may well be right to construe the statute in a manner favourable

liability if it could not reasonably have been foreseen or provided against, as in *Ryan v. Youngs* [1938] 1 All E.R. 522, where a lorry driver suddenly collapsed and died as a result of latent fatty degeneration of the heart.

³² *Nitro-Phosphate, etc., Manure Co. v. London and St. Katharine Docks Co.* (1878) 9 Ch.D. 508, 515. This test was adopted in *Baldwin's Ltd. v. Halifax Corporation* (1916) 85 L.J.K.B. 1769. So a violent gale blowing down a tree, *Hudson v. Bray* [1917] 1 K.B. 520, or a branch from a tree, *Radley v. L.P.T.B.* [1942] 1 All E.R. 433, 434, may relieve from liability as an act of God, yet a strong gust of wind may not: *Hills & Sons v. British Airways* (1936) 56 Ll.L.Rep. 20.

³³ *Ruck v. Williams* (1858) 3 H. & N. 308, at 318.

³⁴ Goodhart, [1951] C.L.P. 177.

³⁵ The Nuclear Installations (Licensing and Insurance) Act, 1959, imposes strict liability for the escape of ionising radiations. See Lloyd, "Liability for Radiation Injuries" [1959] C.L.P. 33.

³⁶ See Denning L.J. in *Pride of Derby and Derbyshire Angling Association v. British Celanese* [1953] Ch. 149, 189. *Contra* Evershed M.R. at 176.

to the defendant.³⁷ Thus in *Green v. Chelsea Waterworks Co.*³⁸ a main belonging to the defendant company burst, and the water flooded the plaintiff's premises. It was held by the Court of Appeal that the company, being authorised by Act of Parliament to lay the main, and having a statutory duty to maintain a continuous supply of water, and having been guilty of no negligence, was not liable in damages to the plaintiff. Lindley L.J., speaking of the rule in *Rylands v. Fletcher*, said³⁹: "That case is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision." On the other hand, in *Charing Cross Electricity Supply v. Hydraulic Power Co.*⁴⁰ the defendants were (as we have seen) held liable for the escape of industrial water: the statute gave them power to take water and lay mains, but they were under no obligation to keep their mains charged with water at high pressure or at all. The distinction is clear. In the *Chelsea Waterworks* case the defendant had not really collected the water "for his own purposes" within the meaning of Blackburn J.'s statement of the rule.⁴¹ Further, the inevitable result of carrying out the statutory duty would be damage from time to time and so by necessary implication the statute excused the company from liability.⁴² But even in such a case it is well settled that there may be liability if there is negligence. Thus in *Hardaker v. Idle District Council*⁴³ the defendants were held liable for an escape of gas from the street into the plaintiff's house, although the only negligence was that of an independent contractor, and although the defendants were acting under statutory authority.

³⁷ *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co.* [1936] A.C. 108; *Smeaton v. Ilford Corporation* [1954] Ch. 450. The statute may, of course, impose a duty to collect dangerous things and yet expressly preserve liability under *Rylands v. Fletcher*: See Reservoirs (Safety Provisions) Act, 1930, s. 7.

³⁸ (1894) 70 L.T. 547.

³⁹ *Green v. Chelsea Waterworks*, 70 L.T. at 549.

⁴⁰ [1914] 3 K.B. 772.

⁴¹ *Dunne v. North Western Gas Board* [1964] 2 Q.B. 806.

⁴² *Ibid.*

⁴³ [1896] 1 Q.B. 335.

§ 131. Liability for Fire

At common law

Liability for damage done by the spread of fire was established many centuries before the rule in *Rylands v. Fletcher* was formulated. The usual remedy was trespass upon the case for negligently allowing one's fire to escape in contravention of the general custom of the realm.⁴⁴ The allegation was that the defendant *tam negligenter custodivit ignem suum* that the plaintiff's property was burnt. Difficulty has arisen over both parts of this phrase.

Tam negligenter. Whatever this meant, it was not negligence in the modern sense.⁴⁵ It has sometimes been suggested⁴⁶ that the common law held an occupier absolutely liable for damage done by fire, but the weight of authority seems to be opposed to this.⁴⁷ A man is responsible for the damage done by his fire if it has been caused wilfully, or by his negligence, or by the escape⁴⁸ without negligence of fire which has been brought into existence for some unnatural purpose within the meaning of the rule in *Rylands v. Fletcher*.

Ignis suus. The defendant is liable in his capacity as occupier of premises, and not on the ground of ordinary negligence.⁴⁹ The occupier is liable for fires started by his servants, contractors or lawful visitors.⁵⁰ But he is not liable for a fire started by an act of God⁵¹ or a stranger—such a fire is not *ignis suus*.

⁴⁴ See Newark, "The Accidental Fires Act (Northern Ireland)" (1945) 6 N.I.L.Q. 134 (the scope of which is wider than the title of the article suggests). In Chap. IV of Roger North's *Autobiography* there is a description of the great fire of 1678 in the Temple.

⁴⁵ *Hargrave v. Goldman* [1964] A.L.R. 377, 385.

⁴⁶ e.g., by Lord Wright in *Collingwood v. Home and Colonial Stores, Ltd.* [1936] 3 All E.R. 200, 203, and by Asquith J. in *Mulholland & Tedd, Ltd. v. Baker* [1939] 3 All E.R. 253, 255.

⁴⁷ *Turberville v. Stampe* (1697) 1 Ld.Raym. 264 (in which Holt C.J. clearly assumed that liability was based on negligence); *Commissioner for Railways v. Wise Bros. Pty.* (1947) 75 C.L.R. 59.

⁴⁸ An escape is necessary: *Doltis Ltd. v. Braithwaite, Ltd.* [1957] 1 Lloyd's Rep. 522, and above, § 122.

⁴⁹ *Sturge v. Hackett* [1962] 1 W.L.R. 1257.

⁵⁰ *Balfour v. Barty-King* [1957] 1 Q.B. 496.

⁵¹ *Hargrave v. Goldman* [1964] A.L.R. 377.

Under statute

The Fires Prevention (Metropolis) Act, 1774,⁵² provides "that no action, suit, or process whatever shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall . . . accidentally begin." One possible interpretation of this very ill-drawn enactment is that it abolishes all liability for accidental fires, whether they are due to negligence or not.⁵³ The meaning of "accidentally begin" has not been finally determined,⁵⁴ but it was held in *Filliter v. Phippard*⁵⁵ that the statute extends only to fires caused by mere chance, or incapable of being traced to any cause,⁵⁶ and that fires due to negligence are still a source of liability.⁵⁷ So are fires due to a nuisance created by the landlord or those for whom he is responsible.⁵⁸ In *Musgrove v. Pandelis*⁵⁹ it was further held that the statute confers no protection even if the fire begins without negligence, provided that the spread of it which did the mischief complained of was due to negligence. The fire which accidentally begins, within the meaning of the statute, is the fire which actually does the mischief and not the fire in its initial and harmless stage.⁶⁰ Hence since the statute there can be no liability for accidental fire in the absence of any negligence on the part of anyone concerned. The present law is a rule of vicarious liability for the negligent acts of all persons except mere

⁵² s. 86. This provision is not limited to London: *Filliter v. Phippard* (1847) 11 Q.B. 347.

⁵³ The opinion of Blackstone: Bl.Comm., Vol. i, p. 431. It is significant that the Act 6 Anne c. 31 imposes on the servant by whose negligence the fire began a fine of £100 to be distributed amongst the sufferers, or imprisonment for 18 months in default of payment. Clearly the modern concept of vicarious liability was not then formed by Parliament.

⁵⁴ See *Balfour v. Barty-King* [1957] 1 Q.B. 496, 504.

⁵⁵ (1847) 11 Q.B. 347. Cf. *Solomons v. Gertzenstein (R.), Ltd.* [1954] 2 Q.B. 243.

⁵⁶ As in *Collingwood v. Home and Colonial Stores* [1936] 3 All E.R. 200.

⁵⁷ The onus is on the defendants to bring themselves within the Act: *Hyman (Sales), Ltd v. Benedyke & Co., Ltd.* [1957] 2 Lloyd's Rep. 601.

⁵⁸ *Spicer v. Smee* [1946] 1 All E.R. 489; *Williams v. Owen* [1955] 1 W.L.R. 1293.

⁵⁹ [1919] 2 K.B. 43.

⁶⁰ *Sturge v. Hackett* [1962] 1 W.L.R. 1257. It has been said that in such a case there are two fires: *Musgrove v. Pandelis* [1919] 2 K.B. 43. It is, however, doubtful whether there is any substance in the distinction. Duke L.J. at 51 thought not; and Scrutton L.J. in *Job Edwards v. Birmingham Canal Navigations* [1924] 1 K.B. 341, 361 thought that instead of speaking of two fires it was safer to say that the fire was continued by negligence, and that the cause of action was not for a fire accidentally begun, but for negligence in increasing such a fire."

strangers—not a rule of absolute liability for accidents for which no one is to blame. Thus in *Sochacki v. Sas*⁶¹ Lord Goddard C.J. refused to impose liability when, in the absence of any evidence of negligence, such as the fire being too large for the grate, the ordinary domestic fire of a lodger spread from the fireplace and damaged the house.

Accidental fires

It has been maintained that even at the present day, and notwithstanding the statute, liability for fire is absolute and independent of negligence. Those who hold this opinion seek to evade the statute by construing the words “shall . . . accidentally begin” as applicable only to fires that are accidental in their origin, and not fires intentionally lit but accidentally spreading and escaping from the defendant’s land. The statute would apply, for example, to a fire caused by lightning or spontaneous combustion, but not to one caused by the bursting of a lamp, or where the coal leaps from the grate of an ordinary household fire.⁶² It is submitted, however, that it is unsound. It seems sufficiently clear that the statute was not intended to apply solely to fires caused by lightning or spontaneous combustion and that the accidental burning of a house by the explosion of a lighted lamp, or burning coal falling out of a grate,⁶³ is as much within the Act as a similar accident caused by an explosion of gunpowder.

Liability for acts of others

At common law it was well established that an occupier was liable for his servants⁶⁴ or guests⁶⁵ or those who had entered his house by his leave or knowledge,⁶⁶ and in this respect the statute of 1774 as interpreted by *Filliter v. Phippard* is probably merely declaratory of the common law. It has been settled that an

⁶¹ [1947] 1 All E.R. 344. See also *Doltis Ltd. v. Braithwaite & Sons (Engineers), Ltd.* [1957] 1 Lloyd’s Rep. 522.

⁶² See Holdsworth, H.E.L., xi, p. 608.

⁶³ *Sochacki v. Sas* [1947] 1 All E.R. 344.

⁶⁴ But a servant acting outside the scope of employment is a stranger: *McKenzie v. McLeod* (1834) 10 Bing. 385; *Eriksen v. Clifton* [1968] N.Z.L.R. 705.

⁶⁵ *Boulcott Golf Club Inc. v. Engelbrecht* [1945] N.Z.L.R. 556.

⁶⁶ *Beaulieu v. Finglam* (1401) Y.B. 2 Hen. IV, 18, pl. 5; *Turberville v. Stampe* (1697) 1 Ld.Raym. 264; *Balfour v. Barty-King* [1957] 1 Q.B. 496.

occupier is also responsible for an escape of fire caused by the negligence of his independant contractor.⁶⁷ Although an occupier has no right to control the mode in which a contractor performs his task,⁶⁸ he yet has control over him in the sense that he has invited him onto the premises and can require him to leave.⁶⁹ An occupier will not, however, be responsible for the acts of a mere stranger over whom he has no control, such as a trespasser⁷⁰—unless, with knowledge of the fire started by the stranger, he has failed to extinguish it within a reasonable time.⁷¹

When the fire is caused by a Rylands v. Fletcher object

As section 86 of the 1774 Act specifically states that the statutory defence is available “any law, usage or custom”⁷² to the contrary notwithstanding” it might be thought to be irrelevant that the plaintiff bases his claim on *Rylands v. Fletcher*.⁷³ But in *Musgrove v. Pandelis*⁷⁴ it was held that the statute did not afford a good defence when the rule in *Rylands v. Fletcher* applied. In that case the defendant’s motor-car caught fire in his garage, over which the plaintiff occupied rooms which were burnt out. It was held that the motor-car with its tank full of petrol was a mischievous thing within the rule in *Rylands v. Fletcher* and that therefore the defendant must make good the loss. In any event, it may be doubted whether the rule in *Rylands v. Fletcher* was correctly applied to the facts of this case.⁷⁵ It has, however, been followed.⁷⁶ Again, in *Jones v. Festiniog Ry.*⁷⁷ and *Powell v. Fall*,⁷⁸ in which the defendants

⁶⁷ *Balfour v. Barty-King* [1957] 1 Q.B. 496, affirming [1956] 1 W.L.R. 779, in which Havers J. cited without disapproval a passage from the 11th edition, which has now been somewhat recast.

⁶⁸ See below, § 202.

⁶⁹ *Balfour v. Barty-King* [1957] 1 Q.B. 496.

⁷⁰ *Balfour v. Barty-King* [1957] 1 Q.B. 496, 504.

⁷¹ *Hargrave v. Goldman* [1964] A.L.R. 377. See above, § 128.

⁷² Thus the absolute liability of an innkeeper is excluded: *Williams v. Owen* [1955] 1 W.L.R. 1293.

⁷³ See Chapman, *Statutes*, p. 112.

⁷⁴ [1919] 2 K.B. 43.

⁷⁵ See above, § 123.

⁷⁶ *Mulholland & Tedd, Ltd. v. Baker* [1939] 3 All E.R. 253; *Balfour v. Barty-King* [1956] 1 W.L.R. 779.

⁷⁷ (1868) L.R. 3 Q.B. 733.

⁷⁸ (1880) 5 Q.B.D. 597; *Mansel v. Webb* (1919) 88 L.J.K.B. 323. Salmond’s explanation of these cases (8th ed., s. 70 (4)) was slightly different. But all of them are expressly founded upon the rule in *Rylands v. Fletcher*, and the earliest also upon the common law authorities as to fire quoted in

were held liable for fire caused by the escape of sparks from locomotive steam-engines used by them, it was held to be no defence that all possible care and skill had been used in the construction and management of these engines to prevent the escape of sparks. In neither case was the engine used under any statutory authority which granted any protection against the ordinary rule of liability at common law.⁷⁹

Who may sue

The right of action is not limited to the adjoining occupier. "If I happen to be on somebody else's land at a time when a fire spreads to that land and my motor-car or property is destroyed, I have just as much right against the person who improperly allows the fire to escape from his land as the owner of the land on which I happen to be."⁸⁰

Who may be sued

Primarily liability rests upon occupancy or control of premises, rather than on the fact that the defendant has failed to control "his fire" (*ignis suus*).⁸¹

Comyns, Dig., Action upon the Case for Negligence, A 6. It is a noteworthy fact that, since the Court of Exchequer in 1858 (3 H. & N. 743) in a judgment subsequently reversed on other grounds ((1860) 5 H. & N. 679) in *Vaughan v. Taff Vale Ry.* held that the statute of 1774 did not apply "where the fire originates in the use of a dangerous instrument knowingly used by the owner of the land in which the fire breaks out," the statute has never been relied upon as a defence in railway cases. In *Powell v. Fall*, the traction engine case, the statute would not be applicable because it only deals with fires originating in the premises or on the estate of the defendant. See Groves's argument for the plaintiff in *Vaughan v. Taff Vale Ry.* (1860) 5 H. & N. 679, 684.

⁷⁹ Liability for fires caused by the escape of sparks or cinders from locomotives is now governed by the Railway Fires Acts, 1905 and 1923.

⁸⁰ *Sochacki v. Sas* [1947] 1 All E.R. 844, at 345, *per* Lord Goddard C.J.

⁸¹ *Sturge v. Hackett* [1962] 1 W.L.R. 1257. If the Court of Appeal in this case had adopted the latter view, the liability of the defendant's insurers would have been limited to £10,000, and not extended to £100,000.

LIABILITY FOR ANIMALS

§ 132. Different Forms of Liability¹

“THE law of torts has grown up historically in separate compartments, and . . . beasts have travelled in a compartment of their own.”² Nevertheless, it can be said that “the responsibility of the owners of animals for damage done by them has developed along two main lines, one a branch of the law of trespass, and the other a branch of the law which imposes upon the owner of a dangerous animal or thing a duty to take measures to prevent it from doing damage.”³ Thirdly, a man may be involved in liability for damage caused by his animals under the general principles of negligence or nuisance.

§ 133. The *Scienter* Action

We shall deal first with the special rule governing liability for dangerous animals. From the fourteenth century an action on the case has provided a remedy for harm done by savage or dangerous animals. The action is commonly known by the convenient although inelegant title of “the *scienter* action.” For liability was and is dependent upon proof that the defendant knew or ought to have known of the animal’s dangerous character.⁴ But the law at an early date decided that certain animals were in their nature so dangerous to mankind that the keeper of them could not be suffered to say that he did not know of their character. *Scienter* was in such a case to be conclusively presumed. Hence under this branch of the law there are

¹ See Williams, *Liability for Animals* (Cambridge, 1939); Holdsworth, 55 L.Q.R. 588-591; Report of the Committee on the Law of Civil Liability for Damage done by Animals (Cmd. 8746, 1953). The Goddard Committee made many suggestions for reform of the law, and these suggestions have been cited judicially with approval several times. But in 1962 Lord Dilhorne L.C. said the Government was not prepared to implement the Report because of its controversial nature: 240 H.L. Deb. 5s. col. 621.

² *Read v. Lyons* [1947] A.C. 156 at 182, *per* Lord Simonds.

³ *Buckle v. Holmes* [1926] 2 K.B. 125, at 128, *per* Bankes L.J.

⁴ *Quod defendens quendam canem ad mordendum oves consuetum scienter retinuit*: so ran the form of the old writ (1 Roll.Abr. 4).

two classes of animals: (1) animals *ferae naturae*, e.g., a tiger or a gorilla, which are obviously of a dangerous nature, although individual animals may be more or less tamed⁵; (2) animals *mansuetae naturae*,⁶ e.g., a dog, a cow, or a horse, which have in individual cases given indications of the development of a vicious or dangerous disposition.⁷ The test to be applied in solving the question whether an animal is to be placed in the class of dangerous animals is danger to mankind.⁸

(1) What animals are included

Whether any particular kind of animal is to be classed as *ferae* or *mansuetae naturae* is a question of law.⁹ "The reason why this is a question of law and not a question of fact is because it is a matter of which judicial notice has to be taken. The doctrine has from its formulation proceeded upon the supposition that the knowledge of what kinds of animals are tame and what savage is common knowledge. Evidence is receivable, if at all, only on the basis that the judge may wish to inform himself."¹⁰ Thus it is a rule of law, and not a mere proposition of fact, that it is not natural for a dog to bite mankind. "The law," said Sir John Holt C.J.,¹¹ "takes notice that a dog is not of a fierce nature, but rather the contrary." So it has been decided that it is not natural for a horse to kick a human being.¹² So though it is in the nature of an elephant to attack human beings,¹³ it is not natural for a bull¹⁴ or a camel¹⁵ to do so.

⁵ A fact which will nevertheless not exempt the defendant from liability: *Behrens v. Bertram Mills Circus, Ltd.* [1957] 2 Q.B. 1.

⁶ The distinction in the language of the cases is sometimes made between "wild" animals on the one hand, and "domestic" or "tame" animals on the other. But the real distinction is between dangerous and harmless: see Williams, "The Camel Case" (1940) 56 L.Q.R. 354, 355-356.

⁷ *Buckle v. Holmes* [1926] 2 K.B. 125, 128.

⁸ *Buckle v. Holmes* [1926] 2 K.B. 125, 129; *M'Quaker v. Goddard* [1940] 1 K.B. 687, 695.

⁹ *M'Quaker v. Goddard* [1940] 1 K.B. 687.

¹⁰ *Behrens v. Bertram Mills Circus, Ltd.* [1957] 2 Q.B. 1, at 15, per Devlin J. Hence it is not open to the courts to reconsider the classifications of former times.

¹¹ *Mason v. Keeling* (1699) 12 Mod. 332, at 335.

¹² *Bradley v. Wallaces Ltd.* [1918] 3 K.B. 629.

¹³ *Behrens v. Bertram Mills Circus, Ltd.* [1957] 2 Q.B. 1.

¹⁴ *Hudson v. Roberts* (1851) 6 Ex. 697.

¹⁵ *M'Quaker v. Goddard* [1940] 1 K.B. 687. See Williams, 56 L.Q.R. 354.

(2) Nature of Liability

He who keeps a dangerous animal keeps it at his peril.¹⁶ Every man is bound at his peril to prevent such animals from going at large or from obtaining in any other manner an opportunity of exercising their mischievous instincts. If any harm is done by them, he is liable without any allegation or proof of negligence unless there exists some specific ground of exemption. This rule is probably not so much a vestigial relic of otherwise discarded doctrine as a special rule of practical good sense. At any rate, it is too well established to be challenged.¹⁷ Thus in *May v. Burdett*¹⁸ the plaintiff had been bitten by a monkey kept by the defendant upon his premises, and in answer to the contention of the defendant that he was not liable save for want of due care in taking precautions against mischief, it was said by Lord Denman C.J.¹⁹: "The gist of the action is the keeping of the animal after knowledge of its mischievous propensities. . . . The conclusion to be drawn from an examination of all the authorities appears to be this: that a person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure at his peril; and that if it does mischief, negligence is presumed without express averment. . . . The negligence is in keeping such an animal after notice." Although the rule is undoubted, the reason given for it in some of the cases—namely, that the very act of keeping a dangerous animal is itself wrongful, and therefore a ground of liability if damage ensues—can no longer be accepted as sound. Even in the case of wild beasts, there is nothing illegal in the possession of them. The keeping of a wild-beast show is a perfectly lawful business, no less than the keeping of cattle, yet tigers and cows will both do mischief after the custom of their kind if they are allowed the opportunity. The keeping of a dangerous animal is to be classed, not as a wrongful act, but as one of those rightful acts which, notwithstanding their

¹⁶ The whole of the paragraph which follows (now somewhat shortened) was cited with approval by Singleton J. in *Gould v. M'Auliffe* [1941] 1 All E.R. 515, 519, affirmed [1941] 2 All E.R. 527.

¹⁷ *Read v. Lyons* [1947] A.C. 156, 171. Yet Lord Goddard's Committee (Cmd. 8746) recommended that the *scienter* action be abolished and that liability for harm done by an animal should be the same as in the case of any other chattel: the degree of care required should vary in proportion to the risk.

¹⁸ (1846) 9 Q.B. 101.

¹⁹ (1846) 9 Q.B. 101, at 112.

rightfulness, are yet the ground of legal liability if harm ensue therefrom even by way of inevitable accident.²⁰

(3) Escape

Some doubt has unfortunately arisen about the scope of the phrase "escape from control." In *Rands v. McNeil*²¹ the plaintiff was employed by the defendant as a farm hand. In the course of his duties he entered a stall in which the defendant kept a bull which both of them knew to be dangerous and the bull injured him. The Court of Appeal held that the plaintiff's action failed. It would have been sufficient to say that the rule of strict liability would not apply as between master and servant on a farm,²² but the members of the court, with varying degrees of emphasis, expressed the view that it was necessary to prove an escape from control. On the facts of *Rands v. McNeil* this may well have been correct, but it can hardly have been the intention of the court to question the well-known cases²³ in which it has been assumed to be irrelevant whether the injury occurred on or off the defendant's premises.²⁴

(4) Proof of the scienter

When damage is done by an animal *ferae naturae* its keeper is liable without proof that the animal had a tendency to do such damage, or (if the animal had such a tendency) that the defendant knew of it.²⁵ The *scienter* is conclusively presumed. But when damage is done by an animal *mansuetae naturae* the

²⁰ *Jackson v. Smithson* (1846) 15 M. & W. 563, 565; *Knott v. L.C.C.* [1934] 1 K.B. 126, 138. The *Doryphora decemlineata*, commonly called the Colorado beetle, is a statutory exception: Destructive Insects Act, 1877, extended to all pests and bacteria by the Destructive Insects and Pests Act, 1927; whilst under the Destructive Imported Animals Act, 1932, the Minister of Agriculture and Fisheries is given power to prohibit by order the keeping of the *Fiber zibethicus* or *Ondatra zibethica*, commonly known as the musk rat, or musquash and other destructive non-indigenous mammals.

²¹ [1955] 1 Q.B. 253.

²² See [1955] 1 Q.B. at 257, 266, 272.

²³ *Besozzi v. Harris* (1858) 1 F. & F. 92 (bear on chain); *Cox v. Burbidge* (1863) 13 C.B.(N.S.) 430 (horse kicking child on highway); *Filburn v. People's Palace & Aquarium Co.* (1890) 25 Q.B.D. 258. Cf. *Read v. Lyons (J.) & Co.* [1944] 2 All E.R. 98, 101 (Cassels J.); [1945] 1 All E.R. 106, 120.

²⁴ See *Henderson v. John Stuart (Farms) Ltd.*, 1963 S.L.T. 22.

²⁵ *Williams, Animals*, lxi. See *Besozzi v. Harris* (1858) 1 F. & F. 92 (bear); *Behrens v. Bertram Mills Circus, Ltd.* [1957] 2 Q.B. 1 (elephant).

plaintiff must show (1) that the animal had previously committed, or attempted to commit, at least one act that showed the particular kind of viciousness now complained of, and (2) that the defendant knew of the act or attempt in question.²⁶ Thus it is not the natural tendency of dogs to bite human beings; therefore it is necessary for the plaintiff to prove that the defendant actually knew that the dog was dangerous and had departed from the peaceful habit of its species. It is not sufficient to prove that he had the means of knowing this, and would have known it had he exercised reasonable care.²⁷ Nor is it sufficient in the case of a harmless animal to prove that the defendant knew that it was an ordinary propensity of animals of the class to which it belonged to do the kind of damage complained of.²⁸ Liability can only be based on the defendant's actual knowledge of the particular animal's past conduct²⁹ and then probably only if it was contrary to the nature of animals of the class to which it belonged.³⁰ This was emphatically affirmed by the Court of Appeal in *Fitzgerald v. E. D. and A. D. Cooke Bourne (Farms), Ltd.*,³¹ in which it was held that there was no liability in *scienter* for personal injuries inflicted by a young filly which was following its own natural propensities, which were also those of fillies as a class, by galloping up to and prancing round visitors to a field. In short, the animal must have a vicious tendency to injure people by attacking them. The court may well have been unduly tender to owners of horses, and much of its reasoning seems to be based on an anthropomorphic conception of animals. For a horse or a dog cannot reason like a human being, and there is something bizarre in seeking the *mens rea* of a pony.

²⁶ Williams, *Animals*, lxi-lxii.

²⁷ *Mason v. Keeling* (1699) 12 Mod. 332.

²⁸ *Buckle v. Holmes* [1926] 2 K.B. 125, 130.

²⁹ *Manton v. Brocklebank* [1923] 2 K.B. 212, 226.

³⁰ *Cutler v. United Dairies, Ltd.* [1933] 2 K.B. 297, 303; *Fitzgerald v. Cooke (E. D. and A. D.) Bourne (Farms), Ltd.* [1964] 1 Q.B. 249 (on this point, the opinion of Diplock L.J. seems preferable to that of Wilmer L.J.). See also below, p. 486. In *Tallents v. Bell* [1944] 2 All E.R. 474, it was held by the Court of Appeal that all dogs fall into one category. If a lurcher or a beagle injures a rabbit, there is no liability because such dogs are specially addicted to hunting. The *scienter* must be established as regards the particular dog. But it is submitted that a dog can never involve his owner in liability for attacking a rabbit, any more than a cat for attacking pigeons, since it is the natural propensity of dogs so to do.

³¹ [1964] 1 Q.B. 249.

On the other hand, the plaintiff is favoured in that it is not necessary to prove that the animal has on any previous occasion actually done the kind of harm complained of; it is enough that it has sufficiently manifested a tendency to do such harm, and that the defendant was aware of the fact.³² But it is necessary to prove knowledge that the animal is prone to do or has done the particular kind of damage complained of. If a horse bites a man the *scienter* is not established by proving that the horse was known to bite other horses.³³ On the other hand, if the animal is known to have a propensity to attack people (in the sense explained above) it is immaterial that it does so from non-vicious motives—e.g., an over-friendly large dog which hugs the plaintiff.³⁴ The knowledge of any servant who has the custody or care of the animal, or whose duty it is to attend to the matter, is deemed equivalent to the knowledge of his master.³⁵ But a master will not be held liable unless he has ownership or possession or control of the dog. He is not vicariously liable for injuries done by his servant's dog.³⁶

An illustrative case

The nature of liability under the *scienter* action is well illustrated by *Behrens v. Bertram Mills Circus, Ltd.*³⁷ The plaintiffs, husband and wife, were both midgets and were on exhibition inside a booth in the funfair at Olympia for which their manager had obtained a licence from the defendants.³⁸ The booth was in a passage-way leading from the funfair to the circus ring along which the defendants' Burmese elephants passed under escort each day. As the elephants were passing the booth one day a small dog, Simba, which had been introduced into the booth by the manager's daughter in breach of the defendants' regulations, ran out and barked at the procession.

³² *Barnes v. Lucille, Ltd.* (1907) 96 L.T. 680. So the common maxim "Every dog is entitled to its bite" is no more accurate law than "Trespassers will be prosecuted."

³³ *Glanville v. Sutton & Co., Ltd.* [1928] 1 K.B. 571.

³⁴ *Fitzgerald v. Cooke (E. D. and A. D.) Bourns (Farms), Ltd.* [1964] 1 Q.B. 249, 259; Prosser, *Torts*, p. 515.

³⁵ *Applebee v. Percy* (1874) L.R. 9 C.P. 647.

³⁶ *Knott v. L.C.C.* [1934] 1 K.B. 126.

³⁷ [1957] 2 Q.B. 1. It is interesting to note that Devlin J. had been member of Lord Goddard's Committee on Liability for Animals.

³⁸ The male plaintiff, who was thirty inches high, claimed to be the smallest man in the world.

Elephants are easily frightened by small dogs and one of them, Bullu, panicked and turned upon Simba. Some of the other elephants followed Bullu and Simba was killed. None of the elephants touched either of the plaintiffs, but parts of the booth fell on the wife and caused her serious injuries. The husband suffered from shock. Devlin J., holding that the plaintiffs were entitled to damages, decided (*inter alia*) the following points: (1) that as a matter of law elephants were *ferae naturae* and it made no difference that Bullu, a female Burmese elephant, was in fact tame and no more dangerous than a cow³⁹; (2) that it was no defence that Bullu was acting out of fright and not viciously and that the damage was not the result of her savage nature. For in the case of animals which are *ferae naturae* by nature and not by disposition considerations of *mens rea* or malevolence were irrelevant. "It may be unreasonable to hold the owner of a biting dog responsible thereafter for everything it does; but it may also be unreasonable to limit the liability for a tiger. If a person wakes up in the middle of the night and finds an escaping tiger on top of his bed and suffers a heart attack, it would be nothing to the point that the intentions of the tiger were quite amiable"⁴⁰; (3) that the defences of *volenti non fit injuria* and contributory negligence were not available to the defendants; (4) that even if the manager was a stranger for the purposes of the rule in *Rylands v. Fletcher* this afforded no defence to an action for damage done by a savage animal.⁴¹

§ 134. The Dogs Act

At common law it was deemed not to be in the nature of a dog to attack sheep or cattle and in such cases proof of the *scienter* was accordingly required. On this point, however, the law has been altered by the Dogs Act, 1906, s. 1 (1), by which it is provided that the owner of a dog shall be liable in damages for injury done to any cattle⁴² by that dog, and it shall not be

³⁹ For the harmfulness of the offending animal is to be judged, not by reference to its particular training and habits, but by reference to the general habits of the species to which it belonged.

⁴⁰ [1957] 1 Q.B. at 17. The rule in cattle-trespass is similar: see below, § 138. This seems to settle a point on which there had long been doubt: but see the dicta of the C.A. in *Brook v. Cook* (1961) *The Times*, July 28.

⁴¹ See further, below, § 137.

⁴² Even if they are trespassing: *Grange v. Silcock* (1879) 77 L.T. 340. *Sed quaere*: *Thethowan v. Capron* [1961] V.R. 460.

necessary for the person seeking such damages to show a previous mischievous propensity in the dog, or the owner's knowledge of such previous propensity, or to show that the injury was attributable to neglect on the part of the owner. The word "cattle" in this statute includes horses, mules, asses, sheep, goats and swine,⁴³ and the Dogs (Amendment) Act, 1928,⁴⁴ added domestic fowl, turkeys, geese, guinea-fowl, ducks and pigeons. The occupier of any house or premises where the dog was kept or permitted to live or remain at the time of the injury shall be presumed to be the owner of the dog, and shall be liable for the injury unless he proves that he was not the owner of the dog at the time.⁴⁵ Liability for all other kinds of mischief done by dogs stands as at common law.

§ 135. A General Survey

Save in respect of proving actual knowledge of a mischievous propensity in the case of mischief not natural to the species of an animal *mansuetae naturae*, the principle of strict liability affirmed in *May v. Burdett*⁴⁶ applies equally to all kinds of animals and to all kinds of mischief done by them. It makes no difference whether the animal is *ferae naturae* or *mansuetae naturae*, naturally wild or tame, whether the damage is done to person or property, or whether the mischievous act is committed on the premises of the owner of the animal or elsewhere.

(1) The *scienter* action distinguished from other causes of action

In order to avoid serious confusion of thought it is necessary carefully to observe that the rule as to the necessity of proving the *scienter* is not a general rule governing the liability of defendants in all cases in which it is sought to make them liable for injuries caused by animals. It is, on the contrary, merely a special limitation of that particular rule of strict liability for

⁴³ s. 7. But not rabbits kept for commercial purposes: *Tallents v. Bell* [1944] 2 All E.R. 474.

⁴⁴ s. 1.

⁴⁵ Dogs Act, 1906, s. 1. It is not clear what these provisions really mean. If the occupier of the premises fulfils this burden of proof, who is liable for the dog? Is the owner, as such, liable at all, or does the term owner mean keeper? Is the keeper liable if he is neither the owner of the dog nor the occupier of the premises? Is the owner of the dog liable if he is no longer in possession of it, as when it has been stolen?

⁴⁶ (1846) 9 Q.B. 101.

dangerous animals with which we are now dealing. The rule as to proof of the *scienter* has no application in cases where the plaintiff has some independent cause of action and alleges as consequential damage some injury done by an animal. In other words, when the plaintiff can sue in trespass, or in contract, or on any other independent cause of action, this rule has no application, and liability for consequential damage caused through the instrumentality of an animal is governed by exactly the same principles, as to remoteness of damage and otherwise, as in the case of inanimate agencies of mischief. Thus he who by contract undertakes any duty of care in respect to the person or property of another must show due care to prevent damage by mischievous animals as well as by any other means and no proof of the *scienter* is needed.⁴⁷

(2) Liability in *scienter*

When, on the other hand, the defendant cannot be made liable in contract, or for trespass, nuisance, negligence or any other of the ordinary heads of liability in tort, but is liable only in respect of his responsibility as the keeper of a dangerous animal the rule as to proof of the *scienter* becomes operative. For example, a landowner owes the user of a highway no duty to prevent his sheep, cattle or other domesticated animals from straying from his land into the highway.⁴⁸ If, therefore, they stray there and overturn a motorist or bicyclist, he cannot sue the defendant for consequential damage caused by the wrongful obstruction of a highway, in which case the liability of the defendant would be subject only to the ordinary restrictions imposed by the rule as to remoteness of damage. The plaintiff is driven to sue the defendant in his capacity as keeper of the animals, and in such a capacity it is a good defence to him that the mischief was natural to the species.⁴⁹ If the mischief was not natural, and *scienter* can be proved, then the defendant will be liable. Thus in *Cox v. Burbidge*,⁵⁰ a decision of a strong Court of Common Pleas in the golden age of the common law, the defendant's horse strayed onto the highway and there kicked

⁴⁷ *Smith v. Cook* (1875) 1 Q.B.D. 79; *White v. Steadman* [1913] 3 K.B. 340.

⁴⁸ *Searle v. Wallbank* [1947] A.C. 341. See below, § 141.

⁴⁹ See above, § 133.

⁵⁰ (1863) 13 C.B.(N.S.) 430 (Erle C.J., Willes, Byles and Keating JJ.).

a child. This was an unnatural act ("everybody knows that it is not at all the ordinary habit of a horse to kick a child on the highway"),⁵¹ but the plaintiff failed as he could not prove that the defendant knew that the horse had this vicious tendency. Nor could the child succeed in cattle-trespass, because he had of course no such proprietary interest in the highway as would entitle him to maintain this action.⁵²

§ 136. Who is Liable

Although it is usual and convenient to speak of the liability of the owner of an animal, liability does not primarily depend on ownership. It depends on possession. He who keeps an animal is responsible for its acts, whether he is the owner of it or not.⁵³ Whether the owner ceases to be responsible if he has entrusted the control to somebody else is an open question. In one case⁵⁴ Atkin L.J. put the rhetorical question: "Can the person who has acquired a tiger, so long as he remains its owner, relieve himself of responsibility by contracting with a third person for its custody?" Yet it would be surprising if it were held that a man who deposited his monkey in a zoo continued to be liable for its mischief, and it has been suggested⁵⁵ that in the case of an animal *mansuetae naturae* known to be dangerous liability continues until the transferee, being a competent person, becomes aware of the vicious propensity.

Liability of occupier

The occupier of the premises on which the animal is kept is not responsible for it unless he is also the keeper of it, even if it is kept there with his permission and with his knowledge of its dangerous character. The material question is: Who had

⁵¹ 13 C.B.(N.S.) at 437, *per* Erle C.J.

⁵² It has sometimes been suggested that the non-natural character of the mischief would also have prevented recovery in cattle-trespass: but this does not seem to be so. See below, § 138.

⁵³ *McKone v. Wood* (1831) 5 C. & P. 1; *Stanford v. Robertson* [1947] 1 D.L.R. 493. As to the liability of an occupier for animals *naturally* upon his land, see below, § 142.

⁵⁴ *Belvedere Fish Guano Co. v. Rainham Chemical Works* [1920] 2 K.B. 487, 504. Lords Buckmaster and Parmoor in *Rainham Chemical Works v. Belvedere Co.* [1921] 2 A.C. 465, 477, 491, would apparently have given an affirmative answer to the question, and Lord Wright a negative one: *Brackenborough v. Spalding U.D.C.* [1942] A.C. 310, 324.

⁵⁵ See Williams, *Animals*, p. 326.

control of the animal? ⁵⁶ But this rule would not, it is submitted, exempt an occupier from liability based on some other principle than that of strict responsibility for the acts of animals. Every occupier, for example, is in general bound to use due care for the safety of persons lawfully entering upon his premises, and not the less so because the source of danger on those premises is the presence of a dangerous animal.⁵⁷

Duration of liability

How long does a person remain responsible for an animal which was once in his possession but has escaped from it? This has never been decided.⁵⁸ Probably, however, a distinction must be drawn between animals which are and those which are not commonly found in a state of natural liberty in the district in which the mischief is done. In the former case the responsibility of the keeper presumably ceases as soon as the animal has recovered, *sine animo revertendi*, that condition of natural liberty from which it was taken. It may be assumed that he who lets a rat out of a trap or releases a captive fox ⁵⁹ is not responsible for its future actions. If, on the other hand, the animal ⁶⁰ is not of a kind which is found in a state of natural liberty, the true rule would seem to be that the owner's liability continues until some other person has assumed the ownership of the animal and has also become aware of its dangerous propensities, at which point the liability for future accidents will be transferred to the new owner.⁶¹

§ 137. Defences to Scienter Action

The following defences are available:—

(1) Contributory negligence

Contributory negligence on the part of the plaintiff is a good defence, subject to the power to apportion the loss under the Law Reform (Contributory Negligence) Act, 1945.⁶²

⁵⁶ *North v. Wood* [1914] 1 K.B. 629; *Knott v. L.C.C.* [1934] 1 K.B. 126.

⁵⁷ See above, § 107.

⁵⁸ See Williams, *Animals*, pp. 336-339.

⁵⁹ See *Mitchil v. Alestree* (1676) 1 Vent. 295, criticised by Holmes, *Common Law*, p. 22. In *Brady v. Warren* [1900] 2 I.R. 632, the defendant was held liable for the acts of his deer which had escaped from his park six years before and had wandered wild ever since.

⁶⁰ Whether *ferae naturae* or *mansuetae naturae* and known to be dangerous.

⁶¹ See Williams, *Animals*, pp. 337-338.

⁶² See note on next page.

(2) Act of God

The escape of an animal from safe custody by the act of God is probably a good defence.⁶⁵

(3) Plaintiff a trespasser

It is also a good defence that the plaintiff, when injured by the animal, was trespassing upon the defendant's premises⁶⁴ where the animal was kept, unless it was kept there with the deliberate purpose of injuring him.⁶⁵ An occupier, as we have seen, owes no duty of care towards a trespasser in respect of the safety of his premises. A farmer is entitled to keep a bull in his field, or a dog in his house, without being liable to a trespasser who enters and is there attacked.⁶⁶

(4) Volenti non fit injuria

The maxim *Volenti non fit injuria* must be deemed no less applicable to dangerous animals than to other dangerous things of which the plaintiff has agreed to run the risk.⁶⁷ So a person who intervenes in a dog-fight may be met with this defence.⁶⁸

(5) Act of third person

How far, if at all, it is a good defence that the immediate cause of the damage complained of was the unlawful act of a third person in letting the animal loose or inciting it to mischief cannot be regarded as being definitely decided. In *Baker v. Snell*⁶⁹ the question was much discussed by a Divisional Court

⁶² *Rands v. McNeil* [1955] 1 Q.B. 253; *McNeil v. Frankenfield* (1963) 44 D.L.R. (2d) 132.

⁶³ In *Nichols v. Marsland* (1875) L.R. 10 Ex. 255, at 260, Bramwell B. expressed doubts upon this point. "If a man kept a tiger, and lightning broke its chain and it got loose and did mischief, I am by no means sure that the man would not be liable." But Bramwell B. "overlooked the probable mollifying effect of the lightning on the tiger": *Vaughan v. Miller Bros.* "101" *Ranch Wild West Show* (1930) 109 W.Va. 170; 153 S.E. 289, per Hatcher J. In any event, there seems to be no good reason for making such a distinction between liability under *Rylands v. Fletcher* and liability for dangerous animals.

⁶⁴ It is probably otherwise if the plaintiff is a trespasser upon the premises of some third party: see above, § 114.

⁶⁵ *Sarch v. Blackburn* (1890) 4 C. & P. 297; above, § 112.

⁶⁶ *Lowery v. Walker* [1910] 1 K.B. 173; [1911] A.C. 10.

⁶⁷ *Behrens v. Bertram Mills Circus, Ltd.* [1957] 2 Q.B. 1.

⁶⁸ *Smith v. Shields* (1964) 108 S.J. 501.

⁶⁹ [1906] 2 K.B. 352, 825. A publican kept on his premises a dog known by him to be savage. The dog was habitually kept chained up, but it was the duty of one of the defendant's servants, the potman, to take the animal

and by the Court of Appeal, but there was such a conflict of judicial opinion that it is difficult to determine what the case decided or to regard it as authority.⁷⁰ But in *Behrens v. Bertram Mills Circus, Ltd.*,⁷¹ Devlin J. held that the judgments of Sir Herbert Cozens-Hardy M.R. and Farwell L.J. in *Baker v. Snell* were authority for the proposition that the wrongful act of a third party is no defence. But it is submitted that it is the opinions of Kennedy L.J. and Channell J. which are entitled to prevail in a tribunal not bound by *Baker v. Snell*. For there seems no reason to draw a distinction between the liability of the keeper of a savage animal and the liability of the occupier of dangerous premises under the principle in *Rylands v. Fletcher*.⁷² Therefore, since the keeping of a dangerous animal, even though a wild beast, is not in itself a wrongful act, he who takes all reasonable care to prevent it from doing mischief should not be responsible for the wrongful act of a stranger⁷³ in letting it loose, or inciting it to evil deeds; just as he who keeps on his land a reservoir of water or any other dangerous inanimate thing is not liable if its escape is caused by the wrongful act of a stranger, at any rate if he could not reasonably have foreseen that the stranger would act as he did.⁷⁴

for a run in the early morning and to chain it up again. One morning in breach of his duty, he took the dog into the kitchen, and by way of a practical joke incited it to attack one of the housemaids. The dog having too readily responded to the invitation, the housemaid sued her employer for the injury so suffered by her. Sutton J. in the Divisional Court, and Cozens-Hardy M.R. and Farwell L.J., in the Court of Appeal, held the defendant liable on the ground that he who keeps a dangerous animal is absolutely liable for its misdeeds, even though the direct cause of the mischief is the independent wrongful act of a third person. But Channell J. in the Divisional Court and Kennedy L.J. refused to accept this wide extension of the responsibility of the keeper of animals. See this case more fully analysed in 9th ed., p. 562, n. (d), and for a remarkably outspoken criticism, see Beven, "Responsibility at Common Law for the Keeping of Animals" (1909) 22 Harv.L.Rev. 465; Pollock, "The Dog and the Potman: or 'Go it, Bob!'" (1909) 26 L.Q.R. 317.

⁷⁰ But Dr. Goodhart, "The Third Man" [1951] C.L.P. 177, at 185, while admitting that the judgments "are, perhaps, not as clearly expressed as one might have wished," says that "it has never been suggested that the authority of a precedent depends on the force of the arguments advanced in its support," and that a conflict of judicial opinion "gives it added force because it makes it clear what the particular point in issue was."

⁷¹ [1957] 2 Q.B. 1.

⁷² This was denied by Devlin J. ([1957] 2 Q.B. 1, 21-22), and Dr. Goodhart ([1961] C.L.P. 177, 186), though for different reasons.

⁷³ As to who is a "stranger," see above, § 128.

⁷⁴ So held in the House of Lords in *Fleeming v. Orr* (1855) 2 Macq. 14.

§ 138. Cattle-Trespass

We now pass to the second branch of the law relating to liability for harm done by animals. Cattle-trespass is one of the oldest grounds of liability in English law.⁷⁵ "If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial."⁷⁶

Distinguished from *scienter*

This must be carefully distinguished from the doctrine of the *scienter* in the case of dangerous animals. Thus in *Theyer v. Purnell*⁷⁷ the defendant's sheep, being infected with scab, trespassed upon the plaintiff's land and were there interned by an act of executive authority and infected the plaintiff's sheep. It was held that the defendant was liable for the resulting damage without any proof of the *scienter*, for the damage was not too remote. "Every owner of sheep must be aware that his sheep are liable to develop scab."⁷⁸ It is instructive to compare with this case the earlier decision in *Cooke v. Wareing*,⁷⁹ where the facts were identical but the plaintiff was non-suited. The reason was, however, that he sued not in trespass, as he might have done, for the entrance of the sheep upon his land, but in trespass on the case for keeping dangerous animals, and therefore took upon himself the needless burden of proving the *scienter*.

It is clear, therefore, that whereas in an action of case for harm done by a dangerous animal, if the animal be *mansuetæ naturæ*, the plaintiff must prove that the defendant had knowledge of the mischievous propensities of the particular animal, in an action of trespass it is sufficient to show that animals of that

⁷⁵ Starting with a case in 1353: 27 Lib.Ass. pl. 56 (Fitz. Trespas 197). See Williams, *Animals*, pp. 127-135, and Holdsworth, H.E.L. Vol. viii, pp. 470-471.

⁷⁶ *Cox v. Burbidge* (1863) 13 C.B.(N.S.) 430, at 433, per Williams J. Yet in *Sutcliffe v. Holmes* [1947] 1 K.B. 147, 152, Somervell L.J. said: "The duty is not absolute, but it is more than a duty not to be negligent."

⁷⁷ [1918] 2 K.B. 333. Cf. *Eustace v. Ayre* [1947] L.J.N.C.C.R. 106.

⁷⁸ [1918] 2 K.B. at 336 per A. T. Lawrence J.

⁷⁹ (1863) 2 H. & C. 332.

kind as a class have such mischievous propensities. Two cases clearly illustrate the distinction. In *Ellis v. Loftus Iron Co.*⁸⁰ the defendant's stallion obtruded its head and feet over the plaintiff's fence, which was a technical trespass, and bit and kicked the plaintiff's mare. The defendant was held liable for the mare's injuries; the damage was not too remote. But in *Manton v. Brocklebank*,⁸¹ in which a mare and a horse were lawfully in the same field so that there was no trespass, and the mare kicked the horse so that it had to be destroyed, the owner of the mare was not liable for the injury done to the horse in the absence of the *scienter*. The owner of an animal *mansuetae naturae* is not responsible for any of the natural propensities of its class (other than trespass to land), even though they may be likely to result in damage.⁸²

"Cattle"

The writ of cattle-trespass was confined originally to damage done by such animals as were comprehended by the Law-French term *avers*. The term included oxen, cows, sheep, goats, pigs, horses, asses, and poultry.⁸³ The action still lies for damage done as the result of the escape of such creatures. There is also liability for the trespasses of tame deer.⁸⁴ But dogs and cats were never *avers*, and whether for this reason or another⁸⁵ it has long been assumed that there is no liability for their trespasses. "The old reports abound with expressions of peculiar regard for dogs and cats,"⁸⁶ and in *Buckle v. Holmes*⁸⁷ the Court of Appeal actually decided that the owner of a cat which had strayed on to the plaintiff's premises and there killed thirteen pigeons and two bantams was not liable in cattle-trespass. The court was clearly of opinion that the same rule applied to dogs. But in the only direct decision on the point liability was imposed for the trespass

⁸⁰ (1874) L.R. 10 C.P. 10. See also *Macatee v. Montgomery*, 1949 S.L.T. 5.

⁸¹ [1923] 2 K.B. 212.

⁸² *Buckle v. Holmes* [1926] 2 K.B. 125, 130. See above, § 133.

⁸³ Williams, *Animals*, pp. 186-187.

⁸⁴ *Brady v. Warren* [1900] 2 I.R. 632. *Aliter* with bees: *O'Gorman v. O'Gorman* [1903] 2 I.R. 578.

⁸⁵ At least six different reasons will be found in the authorities: Winfield, *Tort*, p. 493.

⁸⁶ *Doyle v. Vance* (1880) 6 V.L.R. 87, at 93, *per* Barry J.

⁸⁷ [1926] 2 K.B. 125.

of a dog.⁸⁸ Although this is contrary to the weight of authority in England, the English view cannot be said to be entirely logical. If a cow strays from the land of its owner on to that of a neighbour and there eats a few cabbages, the owner is liable in trespass; but if his dog escapes into his neighbour's house and wrecks a room, he is not liable.⁸⁹

Remoteness of damage

As in all actions of trespass, the damage complained of must be the direct consequence of the wrongful act. It follows that in the normal case of cattle-trespass the damage in question will have been to crops or shrubs, or to the soil itself, and originally the scope of the action appears to have been so limited. But it has been seen that in *Ellis v. Loftus Iron Co.*⁹⁰ damage to the occupier's cattle which was a direct result of the trespass was held to be actionable, and the rule is no doubt the same if the damage done is to any other part of the occupier's personal property.⁹¹ Further, in *Wormald v. Cole*⁹² the Court of Appeal held that damages could be recovered for personal injuries sustained when a trespassing heifer knocked down and trampled upon the occupier.⁹³ In this case the animal had not attacked the plaintiff by reason of any vicious tendency, but probably even such damage is not too remote.⁹⁴ If this be so, it is not the law that the act of an animal contrary to its ordinary nature necessarily makes the damage too remote.⁹⁵

§ 139. Defences to Action for Cattle-Trespass

The special defences open to a defendant in an action for cattle-trespass have not received much consideration from the courts, but a few cases have arisen.

⁸⁸ *Doyle v. Vance* (1880) 6 V.L.R. 87, in which the Supreme Court of Victoria expressly refused to follow the older dicta.

⁸⁹ *Hughes v. Williams* [1943] K.B. 574, 580. Although he *may* be liable in negligence: see below, § 141.

⁹⁰ (1874) L.R. 10 C.P. 10. Cf. *Theyer v. Purnell* [1918] 2 K.B. 333.

⁹¹ *Cooper v. Railway Executive* [1953] 1 W.L.R. 223 (defendants recovered on a counterclaim for a train derailed by straying cattle).

⁹² [1954] 1 Q.B. 614 (Lord Goddard C.J., Singleton and Hodson L.J.J.).

⁹³ Yet Lord Goddard's Committee (Cmd. 8743, para. 3) thought that only damage to land or crops should be actionable. In any event, a non-occupier would have to prove negligence: [1954] 1 Q.B. 621, 625.

⁹⁴ [1954] 1 Q.B. at 625.

⁹⁵ A dictum of Erle C.J. in *Cox v. Burbidge* (1868) 13 C.B.(N.S.) 430 (cited above, § 135) is not really opposed to Lord Goddard's view: Erle C.J. was considering liability under the *scienter* action and not cattle-trespass.

(1) Plaintiff's own default

It is no defence that the plaintiff was under a duty under covenant with his landlord to keep the fence through which the cattle strayed in repair: such an obligation is *res inter alios acta*.⁹⁶ But it is otherwise if the plaintiff's duty to keep the fences in repair is imposed by law⁹⁷ or prescription.⁹⁸

(2) Volenti non fit injuria

It is well established that the occupier of premises adjoining a highway is presumed to have accepted the risks incidental to the passage of ordinary traffic along that highway. Thus in *Tillett v. Ward*⁹⁹ the plaintiff was unable to recover for the damage done to his ironmongery by the defendant's ox, which had escaped from his control while being driven along the highway, for the escape was not due to any negligence on the defendant's part.

(3) Act of third person

It is uncertain what is the position if the damage is due to the unlawful act of a third party. In 1480 it was held¹ that it was no defence that the cattle were chased on to the plaintiff's land by the dogs of a third party, and in 1946 the Court of Appeal seem to have approved this, at least where the defendant has known of the act or default of the third party and taken no precautions to guard against it.² This decision seems consistent with the general tendency of modern law.

(4) Act of God and inevitable accident

It would seem that act of God affords a good defence as it does under the analogous rule of *Rylands v. Fletcher*. On the other hand the weight of authority is against the admission of other forms of inevitable accident as a defence,³ except (as

⁹⁶ *Holgate v. Bleazard* [1917] 1 K.B. 443; *Park v. Jobson and Son* [1945] 1 All E.R. 222.

⁹⁷ *Singleton v. Williamson* (1861) 7 H. & N. 410.

⁹⁸ (1441) Y.B. 19 Hen. 6. 33. pl. 68. On the duty to fence see *Williams, Animals*, pp. 208-226, and *Holdsworth*, 55 L.Q.R. at 591.

⁹⁹ (1882) 10 Q.B.D. 17.

¹ Y.B. 20 Edw. 4, 11, pl. 10.

² *Sutcliffe v. Holmes* [1947] 1 K.B. 147; cf. *McGibbon v. McCurry* (1909) 43 Ir.L.T.R. 132. See *Williams, Animals*, pp. 181-185, and above, § 137.

³ *Cox v. Burbridge* (1863) 13 C.B.(N.S.) 430, 438; *Fletcher v. Rylands* (1866) L.R. 1 Ex. 265, 280; *Ellis v. Loftus Iron Co.* (1874) L.R. 10 C.P. 10.

in other actions of trespass) where the trespass is involuntary, *i.e.*, where the defendant has lost control of the animal.

§ 140. Nature of Liability for Animals

When Sir Colin Blackburn formulated the rule in *Rylands v. Fletcher* he illustrated his principle both by the old action of cattle-trespass and the rule governing the keeping of dangerous animals with knowledge of their propensities. But the provenance of the two rules is distinct. Cattle-trespass was from the earliest times remedied by the action of trespass, whilst the rule as to dangerous animals is an application of the action of trespass on the case.⁴ Although the liability under the latter rule is often spoken of as strict or absolute,⁵ the rule is substantially a branch of the law of negligence,⁶ for liability always depends upon the *scienter*, though in the case of animals *ferae naturae* proof of the *scienter* is dispensed with, and the *scienter* is at least potent evidence of negligence. Since the rule in *Rylands v. Fletcher* was established the rule as to dangerous animals has often been regarded as one branch of it⁷ whilst cattle-trespass has been treated as an illustration of it.⁸ But though both cattle-trespass and liability for animals *ferae naturae* have been brought by the courts into relation with the same general principle of liability laid down by Blackburn J. the older rules are not merged in it—there are differences between the three rules.⁹ Thus in an action under *Rylands v. Fletcher* it is essential to prove an escape from the defendant's premises; but this is not so in the *scienter* action—the plaintiff may recover whether the injury has occurred on or off the defendant's premises.¹⁰

⁴ Yet logically it is hard to see why the escape of cattle should be accounted trespass and the escape of water nuisance: above, § 17. The position is quite different if one *drives* an animal into a neighbour's close, or trains one's dog to accomplish an *asportavit* of another's golf-ball: here there is liability for trespass to land or chattels: see above, §§ 33–34.

⁵ *Knott v. L.C.C.* [1934] 1 K.B. 124, 138; *Read v. Lyons* [1947] A.C. 156, 173, 182.

⁶ *Read v. Lyons & Co.* [1945] K.B. 216, 249; *Sutcliffe v. Holmes* [1947] 1 K.B. 147, 152.

⁷ See authorities collected by Stallybrass in 3 Camb.L.J. 384, and by Williams, *Animals*, p. 352, n. (4).

⁸ *Holgate v. Bleazard* [1917] 1 K.B. 443.

⁹ See Williams, *Animals*, pp. 197–199, 352–353; *Read v. Lyons & Co.* [1945] K.B. 216, 248; [1947] A.C. 156, 166, 170, 175.

¹⁰ *Contra, Rands v. McNeil* [1955] 1 Q.B. 253, 258. But see above, § 133.

§ 141. Liability in Negligence and Nuisance

Although there is no strict liability for animals *mansuetæ naturæ* except in cases of cattle-trespass or where the *scienter* has been proved, a man may be liable for negligence in the keeping of them and for nuisance.^{10a} The plaintiff must first establish a duty owed to him by the defendant to take care. It is a question of law whether in any particular circumstances a duty of care exists and decisions have grafted on to the law certain exceptions to the general test of reasonable foresight laid down by Lord Atkin in *Donoghue v. Stevenson*.¹¹

The rule in Searle v. Wallbank ¹²

One of these exceptions is found in the law relating to liability for negligence in the keeping of animals. In *Searle v. Wallbank* ¹³ the House of Lords affirmed the long-standing rule that the owner or occupier of land adjoining the highway is under no duty to users of the highway to prevent his domestic animals not known to be dangerous from straying on to the highway. This rule is founded upon our ancient social conditions and is in no way related to, or liable to be qualified by, such matters as the relative levels of fields and highway, the nature of the highway, or the amount of traffic upon it.¹⁴ In particular there is probably no ground for a distinction ¹⁵ between town and country.¹⁶ It also follows that since there is no duty to maintain a fence at all, it cannot be a breach of duty to maintain one which is imperfect.¹⁷ Although protests against this rule

^{10a} *Fardon v. Harcourt-Rivington* (1932) 146 L.T. 391, at 392, *per* Lord Atkin.

¹¹ [1932] A.C. 562. See above, § 80.

¹² Bentham, "Animals on the Highway" (1958) 3 U.Q.L.J. 222.

¹³ [1947] A.C. 341.

¹⁴ *Brock v. Richards* [1951] 1 K.B. 529, 534. There may be criminal liability under the Highways Act, 1959, s. 135; but the penalty is only 5s. a head (with a maximum of 90s.) and Sir Carleton Allen "knows of one offender—a serious menace to his neighbourhood—with eighty-four convictions, punishable each time with 5s. only": *Law in the Making*, 7th ed., p. 301. His activities were stopped only when he was bound over to keep the peace in the sum of £25: 77 L.Q.R. 27.

¹⁵ As was once thought: *Deen v. Davies* [1935] 2 K.B. 282.

¹⁶ *Gomberg v. Smith* [1963] 1 Q.B. 25, 40; *Ellis v. Johnstone* [1963] 2 Q.B. 8, 26.

¹⁷ *Searle v. Wallbank* [1947] A.C. 347, 361; *Brock v. Richards* [1951] 1 K.B. 529, 535.

may be found in the reports from 1699¹⁸ to the present day¹⁹ it appears (subject to the exceptions about to be mentioned) to be well suited to the robust conditions of life in the English countryside,²⁰ although less suited to crowded urban areas.²¹ Certainly in any reform of the law (if reform there must be) serious consideration should be given to the characteristics and possibly also the customs of the neighbourhood. There are vast tracks of unfenced moorland which afford grazing for countless sheep in Scotland and the north of England. It would be a great hardship if in future they were to depasture at their owner's peril. Indeed, it is in the fact that most of the roads in this country originated over unenclosed land when the open-field system prevailed and long before fencing became usual that the rule in *Searle v. Wallbank* finds its historical origin.²² Modern examples of these conditions are necessarily rare but not unknown.²³ There might also be grave difficulties in defining the suggested duty in a way intelligible to ordinary men.²⁴ The present rule may be only one aspect of the principle that users of the highway must take it subject to ordinary risks, one of which is that domestic animals not known to be vicious should be found straying there²⁵: "The motorist must put up with the farmer's cattle: the farmer must endure the motorist."²⁶

There seem to be three certain, and two doubtful, exceptions to the rule in *Searle v. Wallbank*. First, there is an "exceptional class of case, where the animal in question is known to have such characteristics as to impose upon its owner a duty

¹⁸ *Mason v. Keeling*, 1 Ld.Raym. 606. In 12 Mod. at 333 counsel is reported as saying "It is hard that one should have a remedy for the least trespass done in his land, and none for a trespass done thus to the person by wounding or maiming."

¹⁹ *Ellis v. Johnstone* [1963] 2 Q.B. 8, 27.

²⁰ The Supreme Court of Canada regards it as unsuited to conditions in Ontario: *Fleming v. Atkinson* (1959) 18 D.L.R. (2d) 81.

²¹ *Gomberg v. Smith* [1963] 1 Q.B. 25, 31.

²² *Carmarthenshire County Council v. Lewis* [1955] A.C. 549, 561. The judgment of Viscount Maugham in *Searle v. Wallbank* contains a most interesting survey of the history of English roads.

²³ They occurred in *Fitzgerald v. Cooke* (E. D. and A. D.) *Bourne (Farms), Ltd.* [1964] 1 Q.B. 249, 261, 268.

²⁴ *Searle v. Wallbank* [1947] A.C. 347, 351. Thus pigs and fowls cannot be prevented from straying by ordinary quickset hedges, yet accidents due to their presence on roads are probably more frequent than those arising from straying horses or cattle. Lord Goddard's Committee (Cmd. 8746) was prepared to recommend a modification of the rule in *Searle v. Wallbank*.

²⁵ Lord Porter was prepared to decide *Searle v. Wallbank* on this ground.

²⁶ [1947] A.C. 347, at 361. *per* Lord du Parcq.

to take steps to prevent it from endangering the public by getting on the highway and there exhibiting its characteristics to the danger of users of the highway.”²⁷ The special circumstances which may take the case out of the general rule laid down in *Searle v. Wallbank* may relate to the nature of either (i) the animal, or (ii) the topographical context in which it was kept.²⁸ As to (i) there might be liability if an animal bounds out of a gate so often that it becomes more like a missile than an animal; as to (ii), the very existence of the exception is uncertain, because there are conflicting dicta in the Court of Appeal,²⁹ and no judicial illustration of such special circumstances has yet been given. The only point which is clear is that it is not a special circumstance that the animal is more prone than its fellows to stray on to the highway; for that is just what the law permits it to do.³⁰ But it should be remembered that the facts relied on as constituting special circumstances cannot as a matter of law be special circumstances. In any event, where no special circumstances exist negligence cannot be established merely by proof that a defendant has failed to provide against the possibility that a tame animal of mild disposition will do some dangerous act contrary to its ordinary nature.³¹ Thus in *Wright v. Callwood*³² there was no liability when a calf was being driven into a farmyard and, startled by the sudden starting of the engine of a lorry not known to be present, dashed back down the drive into the highway and upset a cyclist.

Secondly, it may be that the rule in *Searle v. Wallbank* does not apply to the escape of animals in such numbers as to cause an obstruction,³³ but if this is so it seems to be an instance of liability for nuisance rather than for negligence.

Thirdly, it is the duty of those who bring or drive animals on to or along the highway to take reasonable care that they do

²⁷ *Brock v. Richards* [1951] 1 K.B. 529, at 535-536, per Evershed M.R.

²⁸ *Ellis v. Johnstone* [1963] 2 Q.B. 8, 21, 26.

²⁹ *Contra*, Evershed M.R. in *Brock v. Richards* [1951] 1 K.B. 529, 535-536; *pro*, Ormerod L.J. in *Ellis v. Johnston* [1963] 2 Q.B. 8, 21.

³⁰ *Brock v. Richards* [1951] 1 K.B. 529, 535-536.

³¹ *Searle v. Wallbank* [1947] A.C. 347, 360, per Lord du Parcq.

³² [1950] 2 K.B. 515.

³³ As in *Cunningham v. Whelan* (1917) 52 I.L.T.R. 67.

no damage to the persons or property of others.³⁴ What constitutes reasonable care is a question of fact, and the standard may not be the same in the country as in the town.³⁵ Thus the defendant was held liable when he emerged from a supermarket with a St. Bernard dog standing hip-high which dashed across the highway into the plaintiff's car.³⁶ It is a question of fact in each case whether the transit along the highway, and therefore the duty, has come to an end. Thus if a journey is still in progress a duty of care exists as much when a horse is kept in a place adjoining a highway as when it is left on the highway itself.³⁷

Fourthly, it is possible that the House of Lords might hold that as dogs are not "cattle" within the cattle-trespass rule³⁸ they are also outside the rule in *Searle v. Wallbank*, and so within the general principle of liability for negligence. Some dicta favour this view,³⁹ but others disapprove it.⁴⁰

Fifthly, it is also possible that the House of Lords might hold that the rule in *Searle v. Wallbank* does not extend to urban areas, but the authorities do not favour this distinction.⁴¹

§ 142. Liability for Nuisance

Actions for nuisance caused by animals do not require lengthy consideration.⁴² Logically cattle-trespass should have fallen under this head.⁴³ Further, it might well have been held that obstruction of a highway by an animal was a nuisance, but the cases, as we have seen, have almost all been decided on the basis of negligence. But it has been held⁴⁴ that a dog with a

³⁴ *Cunningham v. Whelan* (1917) 52 I.L.T.R. 67 (24 cows on road in Co. Waterford); *Furlong v. Cunan* [1959] Ir.Jur.Rep. 30 (nine cows on road in Co. Roscommon); *Searle v. Wallbank* [1947] A.C. 341, 356; *Wright v. Callwood* [1950] 2 K.B. 515, 526.

³⁵ *Gomberg v. Smith* [1963] 1 Q.B. 25, 30.

³⁶ *Gomberg v. Smith* [1963] 1 Q.B. 25, 30.

³⁷ See *Wright v. Callwood* [1950] 2 K.B. 515, 526, 531; *Searle v. Wallbank* [1947] A.C. 341, 356; Goodhart, 66 L.Q.R. 456; Treitel, 14 M.L.R. 347.

³⁸ See above, § 138.

³⁹ *Gomberg v. Smith* [1963] 1 Q.B. 25, 35, 41-43 (Holroyd Pearce and Davies L.J.J.)

⁴⁰ *Ellis v. Johnstone* [1963] 2 Q.B. 8, 25, 28.

⁴¹ See above, note 16.

⁴² See Williams, *Animals*, pp. 235-262.

⁴³ Above, § 140.

⁴⁴ *Pitcher v. Martin* [1937] 3 All E.R. 918.

long loose lead running about by itself in the streets of London is a nuisance, and if it be law that a man is liable for animals escaping to a highway in such numbers as to amount to an obstruction there also may be liability in nuisance. It is necessary to rely upon nuisance where there is no escape or no negligence or where the animal is not dangerous. So the stench of pigs,⁴⁵ the barking of dogs,⁴⁶ and the crowing of cockerels⁴⁷ have each been held to constitute a nuisance.

Wild animals

It remains to consider how far a man may be liable in nuisance for damage done by animals of an undomesticated class. In general, there is no liability for the escape of noxious animals naturally on the defendant's land, such as rats, rabbits or birds.⁴⁸ But if for the purposes of sport or otherwise, a man purposely accumulates rabbits or game upon his land, he is probably liable for all damage done by them to neighbouring proprietors.⁴⁹ So if he keeps bees in an unreasonable number⁵⁰ or manure in such unreasonable quantities as to attract flies⁵¹ or, it seems, rats⁵² he will be liable for a nuisance. It has been held that rooks are a nuisance to the neighbourhood where they are.⁵³

⁴⁵ *Aldred's Case* (1610) 9 Co. 57 b.

⁴⁶ *Williams, Animals*, pp. 236-237. There may also be criminal liability under a local by-law, as in *Morrissey v. Galer* [1955] 1 W.L.R. 110, or under the Public Health Act, 1936, s. 92.

⁴⁷ *Leeman v. Montagu* [1936] 2 All E.R. 1677.

⁴⁸ *Brady v. Warren* [1900] 2 I.R. 632; *Stearn v. Prentice Bros.* [1919] 1 K.B. 394.

⁴⁹ *Farrer v. Nelson* (1885) 15 Q.B.D. 258, 260. Cf. *Peech v. Best* [1931] 1 K.B. 1, 14, followed in *Seligman v. Docker* [1949] Ch. 93. It is true, indeed, that in *Bowlston v. Hardy* (1597) Cro.Eliz. 547, it was decided that the making of coney burrows and the keeping of coneys therein which ate the crops on the adjoining land of the plaintiff was no cause of action. But the reason given for the decision is the very insufficient one that the defendant had no property in the coneys—that they were not *his*, and therefore that he was not answerable for them. Probably this case is no longer law, though approved and followed in *Stearn v. Prentice Bros.* [1919] 1 K.B. 394, in which case, however, the rats had not been purposely accumulated by the defendants. See *Brady v. Warren* [1900] 2 I.R. 632, and *Williams, Animals*, pp. 242-244, 258; Holdsworth in 55 L.Q.R. 591.

⁵⁰ *O'Gorman v. O'Gorman* [1908] 2 I.R. 394.

⁵¹ *Bland v. Yates* (1914) 58 S.J. 612. But see *Williams, Animals*, p. 260.

⁵² *Stearn v. Prentice Bros.* [1919] 1 K.B. 394.

⁵³ *Hannam v. Mockett* (1824) 2 B. & C. 943. In the old and unsatisfactory case of *Dewell v. Sanders* (1619) Cro.Jac. 490, 491, it seems to have been held that pigeons were not a private nuisance: but see *Hamps v. Darby* [1948] 2 K.B. 311, and *Williams, Animals*, pp. 250-253.

INJURIES TO DOMESTIC RELATIONS

§ 143. Introductory

IN this chapter we shall consider those tortious acts which are an injury neither to the person, nor reputation, nor physical property, but are based on a wrongful interference with a man's relations with others, for example, his wife, his children or those with whom he holds a contract. For a man may be damnified by the death of another person,¹ by the loss of his wife's *consortium*, by the seduction of his daughter, by the deprivation of the work of his servants or by the non-fulfilment of contractual obligations due to him from another. If the law had been developed on a rational basis without reference to the accidents of history it might have been expected that a fundamental distinction would have been taken between intentional and careless invasions of the security of existing domestic and contractual relations. On the one hand, it would have been natural to find a remedy given to one who had suffered loss from a wilful act done with the object and effect of depriving him of the benefits which he enjoyed from a relationship with another, at least whenever the deprivation was permanent, and whether the relationship was with a spouse, parent, child, employer, servant, partner, or contractor. For the general principle is that violation of a legal right committed knowingly gives a cause of action unless there is some reason to the contrary.² On the other hand, it would have been surprising to find a remedy given to one who had suffered such a loss as the result of an act not done with the object (although having the effect) of depriving him of the advantages of the continuance of the relationship in question. The only exception might have been the case of a family deprived of its bread-winner. For it is equally clear that the general

¹ "Whenever a man dies, if he is a man of an active type, it has repercussions, great or small, on all those with whom he has been previously concerned": *Burgess v. Florence Nightingale Hospital for Gentlewomen* [1955] 1 Q.B. 845, at 855, *per* Devlin J.

² See above, §§ 3-5.

principle is that the mere fact that an injury to A prevents a third party getting from A a benefit which he would otherwise have obtained does not invest the third party with a right of action against the wrongdoer.³ This, however, has not been the approach which the law has adopted.

The vagaries of English legal history have produced a situation in which the interest which one person has in the continuance of his existing relationship (whether domestic or contractual) with another is protected by the law in a way which is at once surprisingly wide and surprisingly narrow. We shall consider in turn the relations of (1) master and servant, (2) parent and child, and (8) husband and wife, and in respect of each relationship we shall consider the actions for (1) loss of services, (2) enticement, and (8) harbouring.

§ 144. Master and Servant⁴

(1) Action *per quod servitium amisit*

It is a tort actionable at the suit of a master to take away, imprison, or cause bodily harm to his servant, if (i) the act is a tort as against the servant, and (ii) the master is thereby deprived of his servant's services.⁵ Note that no action lies if the servant is killed by the defendant. From the earliest days of the common law the master had an action of trespass against the wrongdoer whose battery or other wrongful act had brought about the loss of the services of his servant (*per quod servitium amisit*). It is of course significant that the action was originally in trespass and not in case: for although the act complained of must have been wrongful as against the servant himself,⁶ it

³ *Att.-Gen. for New South Wales v. Perpetual Trustee Co., Ltd.* [1955] A.C. 457, 484; *Commissioner for Railways (N.S.W.) v. Scott* (1959) 102 C.L.R. 392. See also above, § 83.

⁴ See Cowen, "The Action Per Quod Servitium Amisit and the Police" [1953] 2 Univ. of W.A. Ann. L. Rev. 263; Brett, "Consortium and Servitium" (1955) 29 Aust. L.J. 321, 389, 428; Gareth Jones, "Per Quod Servitium Amisit" (1958) 74 L.Q.R. 39; Fleming, 22 M.L.R. 682; Holdsworth, H.E.L., iv, pp. 383-386; viii, p. 448; 11th Report of the Law Reform Committee (1963, Cmnd. 2017).

⁵ This sentence was cited by Ferguson J. in *Berman v. Occhipinti* [1954] 1 D.L.R. 560, 563.

⁶ In the action by a parent for the seduction of his child this would never (and in the actions for enticing and harbouring or procuring breach of contract not necessarily) be the case. Hence, whatever the history of the matter, these causes of action (though related) are now distinct: *Perpetual Trustee Co. Case* [1955] A.C. at 486.

was also regarded as being a direct invasion of the interest of a proprietary nature which the master had either in the servant himself or in the services which were the fruit of the relationship between them.⁷ Despite the great social and economic changes which have occurred in the relationship of master and servant this is still the basis of the action—which, however, is today best thought of as “innominate” rather than as one of trespass or case.⁸ In truth, the doctrine is an historical relic of the days when a master had a proprietary interest in his servant⁹ and seems anomalous in modern industrial conditions.¹⁰ On the other hand, it can be persuasively argued that the situation of the employer who has sustained loss by an injury to his servant may be of serious economic importance today for the first time since the years following the Black Death. This is partly because many employers are bound, either legally or morally, to pay their employees sick pay and medical expenses in the event of injury, and partly because it may be very difficult to replace a skilled man on whose training much money may have been spent. The courts may have acted too rapidly in confining the scope of the action.¹¹

(i) *Who is a servant*

The fact that the basis of the action is the injury done to the master's proprietary interest means that its scope is at once surprisingly wide and surprisingly narrow. On the one hand, the plaintiff may be the head of a household who has been deprived of the services of his wife, child, apprentice, or servant. The action does not depend on any contract of service but on

⁷ *Inland Revenue Commissioners v. Hambrook* [1956] 2 Q.B. 641. See note 9 below.

⁸ *Perpetual Trustee Co. Case*, 85 C.L.R. at 248, per Dixon J.

⁹ Or rather, perhaps, in the services which were the fruit of the relationship between them: see the remarks of Windeyer J. in *Commissioner for Railways (N.S.W.) v. Scott* (1959) 102 C.L.R. 392, 450, criticising the above sentence.

¹⁰ This sentence was cited with approval by Viscount Simonds in the *Perpetual Trustee Co. Case* [1955] A.C. at 482, and by the Law Reform Committee (11th Report, p. 8).

¹¹ So the Law Reform Committee (Cmd. 2017), although recommending the abolition of the action, also suggested that an employer who has incurred expense in consequence of the injury to his employee should be able to recover from the tortfeasor to the extent that the latter's liability to the employee has been reduced.

the single fact of service.¹² This is most clearly illustrated by the seduction cases.¹³ Hence the question has arisen whether the scope of the action extends to anyone employed under a contract of service, no matter how specialised or skilful the nature of the services may be, as does the doctrine of vicarious liability. Indeed the Court of Appeal has held that the scope of the action must be restricted to those menial servants¹⁴ who originally formed part of the *familia* or household.¹⁵ But this decision has been the subject of some very damaging criticism on historical grounds,¹⁶ and certainly in the past the action has been held to lie in respect of the loss of services of a "servant and traveller,"¹⁷ an apprentice,¹⁸ music-hall artiste,¹⁹ and it might even lie in respect of the director or general manager of a modern trading company.²⁰ But as there is a fundamental difference between the domestic relation of master and servant and that of the holder of a public office and the state which he serves, the action does not lie for the loss of the services of a police officer,²¹ a member of the armed forces,²² or an established civil servant.²³ Moreover, if the relationship of master and servant exists it is irrelevant that at the time of the wrongful act the servant was off duty: if the law were otherwise there would, as Lord Goddard

¹² *Perpetual Trustee Co. Case* [1955] A.C. at 483; *Inland Revenue Commissioners v. Hambrook* [1956] 2 Q.B. 641, 666. So it is possible for two or more masters to sue in respect of the same wrong done to a servant: *Rist v. Faux* (1863) 4 B. & S. 409. But under the doctrine of vicarious liability only one master is liable for a wrong done by a servant: below, § 193.

¹³ See below, § 145.

¹⁴ So called from the obsolete Middle English term *meinie*, signifying family, household, or retinue. The derivation given in Blackstone (Comm. I, 425) is incorrect.

¹⁵ *Inland Revenue Commissioners v. Hambrook* [1956] 2 Q.B. 641.

¹⁶ *Commissioner for Railways (N.S.W.) v. Scott* (1959) 102 C.L.R. 392.

¹⁷ *Martinez v. Gerber* (1841) 3 Man. & G. 88.

¹⁸ *Hodsoll v. Stallebrass* (1840) 11 Ad. & E. 301. *Non constat* that the decision is wrong: "Perhaps he slept under the counter": [1956] 2 Q.B. at 664, *per* Denning L.J. *Contra*, Fleming, 22 M.L.R. 683.

¹⁹ *Mankin v. Scala Theodrome Co., Ltd.* [1947] K.B. 257. See the *Perpetual Trustee Co. Case* (1952) 85 C.L.R. 237, 286.

²⁰ *Perpetual Trustee Co. Case*, 85 C.L.R. at 248. *per* Dixon J.; *Berman v. Occhipinti* [1954] 1 D.L.R. 560. *Cf. Lee v. Sheard* [1956] 1 Q.B. 102; *I.R.C. v. Hambrook* [1956] 2 Q.B. 641, 666.

²¹ *Perpetual Trustee Co. Case* [1955] A.C. 457, at 489.

²² *The Commonwealth v. Quince* (1944) 68 C.L.R. 227.

²³ *I.R.C. v. Hambrook* [1956] 2 Q.B. 641. A restrictive interpretation has also been adopted in South Africa: *Union Government v. Ocean Accident Corpn.*, 1956 (1) S.A. 571 (magistrate).

remarked,²⁴ be a short and simple answer in most of the seduction cases.²⁵

On the other hand the scope of the action is narrow in that "notice is only taken of the wrong done to the superior of the parties related . . . while the loss of the inferior by such injuries is totally unregarded."²⁶ This language "falls a little strangely on modern ears"²⁷ but the conclusion is a perfectly logical deduction from the principle that he alone can sue who can show a proprietary interest in the services of another. The result is curious. "If the injured man was engaged in a business, and the injury is a serious one, the business may have to be closed down and the employees be dismissed. A daughter of the injured man may have to give up work which she enjoys and stay at home to nurse a father who has been transformed into an irritable invalid."²⁸ But the wife, child, servant, partner, or insurer is without a remedy.

(ii) *Nature of the wrongful act*

"It does not matter as regards the master's right to sue how the injury is caused to the person of his servant, whether by an assault, by battery,²⁹ by negligence,³⁰ or otherwise.³¹"³² The defendant is responsible whether or not he knew that the relationship of master and servant existed, and even though the master may have been ten thousand miles away. Proximity is irrelevant. This marks a sharp distinction between the action for loss of services and the actions for enticement and harbouring and procuring a breach of contract.³³ As the master's remedy is distinct from any which the servant may have it is irrelevant that the servant has been guilty of contributory negligence.³⁴

²⁴ *I.R.C. v. Hambrook* [1956] 2 Q.B. 641, 657.

²⁵ See below, § 145.

²⁶ Bl.Comm., III, 142.

²⁷ *Best v. Samuel Fox & Co.* [1951] 2 K.B. 639, at 666, per Birkett L.J.

²⁸ *Best v. Samuel Fox & Co.* [1952] A.C. 716, at 794, per Lord Morton of Henryton. Cf. Lord Goddard at 731.

²⁹ Such an action lay as far back as Y.B. 19 Hen. 6. pl. 94.

³⁰ As in *Mankin v. Scala Theodrome Co.* [1947] K.B. 257.

³¹ As in *Hodsoll v. Stallebrass* (1840) 11 Ad. & E. 301 (dog biting off thumb of watchmaker's apprentice).

³² Dicey, *Parties in an Action*, p. 326.

³³ See the *Perpetual Trustee Co. Case* [1955] A.C. at 485.

³⁴ *I.R.C. v. Hambrook* [1956] 2 Q.B. 641, 657, 669, 673. But if the servant's rights are derived solely from a breach of contract the master probably cannot sue: *Mankin v. Scala Theodrome Co.* [1947] K.B. 257.

Yet the Law Reform Committee³⁵ thought the employee's contributory negligence should be taken into account in assessing the expenses necessarily incurred in consequence of the injury to the servant. This is certainly illogical, although it may have the attraction of the justice commonly described as rough, for the employer's expenses are the same whether the employee has been guilty of contributory negligence or not.

(iii) *Damage*

It was settled at an early date that although the action was in trespass it had to be laid with a *per quod* showing consequential damage and was not actionable *per se*. What has to be assessed is the value of the services which the plaintiff has lost, and it seems to be assumed (perhaps with little justification) that the appropriate standard is in general provided by the payments made, or to be made, by way of wages to the injured man, though it might be more logical to measure the master's loss by the payments which he has had to make to a substitute by way of wages or overtime rates.³⁶ The value of future loss of services is recoverable,³⁷ but on the other hand no claim can be made in respect of voluntary payments to the injured party.³⁸ Hence the value of voluntary or *ex gratia* payments by way of pensions³⁹ or sick pay⁴⁰ cannot be recovered, either in this action or in quasi-contract.⁴¹ It would seem to follow that medical expenses which have not been incurred in pursuance of some legal duty are not recoverable, but in practice claims for such expenses, if incurred reasonably and naturally, are not challenged.⁴² The difficulty of the problem is increased by the fact that there is still some uncertainty as to the measure of damages which the

³⁵ 11th Report, p. 6.

³⁶ This difficult matter is discussed in the *Perpetual Trustee Co. Case*, 85 C.L.R. 242, 272, 289-291; *Blundell v. Musgrove* (1956) 96 C.L.R. 73, 94; *Scott's Case* (1959) 102 C.L.R. 392, 408-409; Fleming, 22 M.L.R. 685-686; Parsons, "Damages in Actions for Personal Injury" (1957) 30 Austr.L.J. 618.

³⁷ *Hodgson v. Stallebrass* (1840) 11 Ad. & E. 301. Cf. the approach in *Mankin v. Scala Theodrome Co., Ltd.* [1947] K.B. 257.

³⁸ *Admiralty Commissioners v. S.S. Amerika* [1917] A.C. 38, 42, 61.

³⁹ *Admiralty Commissioners v. S.S. Amerika* [1917] A.C. 38, 42, 61.

⁴⁰ *Inland Revenue Commissioners v. Hambrook* [1956] 2 Q.B. 641. *Att.-Gen. v. Valle-Jones* [1935] 2 K.B. 209 can no longer be regarded as authoritative.

⁴¹ *Receiver for the Metropolitan Police District v. Croydon Corporation* [1957] 2 Q.B. 154.

⁴² They were permitted in *Barnes v. Pooley* (1935) 51 T.L.R. 391.

servant himself can recover by way of sick pay or medical expenses.⁴³ "The result has been a brood of devices, misshapen creatures, such as gifts which may not be retainable and loans which may not have to be repaid."⁴⁴

(2) Enticement of a servant

At an early date a remedy by way of an action on the case was developed when a stranger had deprived a master of his servant not by force, but by persuasion. In the absence of lawful justification it is a tort actionable at the suit of a master to induce his servant to leave his employment wrongfully⁴⁵ or to induce him by illegal means, such as fraud or intimidation, to leave his employment even rightfully, or to conspire to do so.⁴⁶ When no illegal means of inducement or coercion are used by the defendant, it is not a tort to induce a servant to leave his master's service, unless the act of the servant in doing so is wrongful. Therefore, to persuade a servant to leave a merely *de facto* service⁴⁷ or to terminate a contractual service by due notice is not actionable.

Lumley v. Gye

The action is available even though employer and employed do not stand in the strict relation of master and servant. This has been established ever since *Lumley v. Gye*.⁴⁸ The plaintiff was the lessee and manager of a theatre. Miss Johanna Wagner, an artiste of some distinction, had agreed with the plaintiff to sing in his theatre for a definite term and during that term not to sing elsewhere. The defendant, "knowing the premises, and maliciously intending to injure the plaintiff," before the expiration of the term enticed and procured Miss Wagner to

⁴³ See below, § 217.

⁴⁴ *Commissioner for Railways v. Scott* (1959) 102 C.L.R. 392, at 462, *per* Windeyer J. See Lord Goddard C.J. in *I.R.C. v. Hambrook* [1956] 2 Q.B. 641, 656-657.

⁴⁵ *Lumley v. Gye* (1853) 2 E. & B. 216; *Bowen v. Hall* (1881) 6 Q.B.D. 383.

⁴⁶ *Evans v. Walton* (1867) L.R. 2 C.P. 615; *Conway v. Wade* [1909] A.C. 506, 510; *Sorrell v. Smith* [1925] A.C. 700, 747.

⁴⁷ *De Francesco v. Barnum* (1890) 45 Ch.D. 430. This limitation is perhaps implied in the judgments in *Evans v. Walton* (1867) L.R. 2 C.P. 615. But an action lay for enticing from *de facto* service under a voidable contract in *Keane v. Boycott* (1795) 2 H.Bl. 512; and see *Sykes v. Dixon* (1839) 9 A. & E. 698, and *Dixon v. Dixon* [1904] 1 Ch. 161.

⁴⁸ (1853) 2 E. & B. 216.

refuse to perform. A majority of the Court of Queen's Bench held that the defendant was liable in damages to the plaintiff. The action for enticement was not limited to such menial servants as were comprehended by the Statute of Labourers.⁴⁹

(3) Harboursing a servant

It is actionable knowingly to continue to employ the servant of another, though the person so continuing to employ the servant did not procure him to leave his master or know when he engaged him that he was the servant of another.⁵⁰ The action lies even when the relationship is not strictly one of master and servant.⁵¹ As the action is one of case, damage must be proved. Hence it is a defence to show that the servant would not in any event have returned to the first employer.⁵²

§ 145. Parent and Child

No parent has, as such, any right in respect of his child of such sort that an action for damages will lie against any other person for a violation of that right.⁵³ The only right which a parent has as such is a right to the possession and custody of his child during minority. The remedy for the infringement of this right is not an action for damages against the person who deprives him of his child but the recovery of possession either by means of a writ of habeas corpus or by an application to the Chancery Division to exercise its power in respect of the guardianship of infants.⁵⁴ Nor, conversely, has a child any action for any loss

⁴⁹ As Coleridge J. in his powerful dissenting judgment had suggested. Note that it was not by reason of any wrong done to Miss Wagner that the plaintiff suffered damage. The decision is also the basis of the rule that it is a tort maliciously to procure a breach of contract: see below, § 151.

⁵⁰ *Jones Bros. (Hunstanton) Ltd. v. Stevens* [1955] 1 Q.B. 275.

⁵¹ *De Francesco v. Barnum* (1890) 63 L.T. 514 (a different action from that reported in (1890) 45 Ch.D. 430). *Contra* Shearman J. in *Long v. Smithson* (1918) 116 L.T. 678, on the ground that this would enable "a man who had been engaged to a lady who had jilted him to sue another person who had married her." But see *Lauterpacht*, 52 L.Q.R. 520, n. 10.

⁵² *Jones Bros. (Hunstanton) Ltd. v. Stevens* [1955] 1 Q.B. 275. It is hard to see how a plaintiff could ever rebut this, especially in a state of full employment.

⁵³ *Hall v. Hollander* (1825) 4 B. & C. 660.

⁵⁴ It is true, indeed, that an action of trespass would formerly lie at the suit of the father for the taking away of his son and heir, but this remedy did not extend to the taking away of his other children, and the ground of the action even in the case of the son and heir was the valuable interest which the father had in the marriage of the child under the old system of tenure in chivalry.

which he may have suffered from interference with his relationship with his parents (apart from that provided by the Fatal Accidents Acts, 1846 to 1959). "His mother may be maimed for life as the result of the negligent conduct of the defendant, a paramour may entice her to leave the family home—but the child cannot sue in tort."⁵⁵

The law has, however, given to a parent in his capacity as head of the household, the following remedies in respect of the loss of his child.

(1) Action for loss of services

It is a tort actionable at the suit of a father (or other person *in loco parentis*) to take away, imprison, or cause bodily harm to his child (male or female), if (i) the relation of master and servant existed between them, (ii) the act is a tort as against the child,⁵⁶ and (iii) the parent is thereby deprived of his child's services.

As to (i), all rights of action vested in a parent in respect of his child are vested in him not in his capacity as a parent but in his capacity as the master of his child and are therefore dependent upon the existence in the particular case of relation of master and servant. If this relation does not exist, either because the child is too young to give any services,⁵⁷ or because he is in the service of some other person, or for any other reason, the father has no remedy for any wrong done to him in respect of his child.⁵⁸ The service may be contractual, *de facto*, or constructive.

As to (ii), it is irrelevant whether the wrongful act be intentional⁵⁹ or negligent,⁶⁰ or that the defendant did not know the injured person was a child of the plaintiff. As to (iii), the parent must prove damage resulting from the loss of services. Hence no damages can be recovered for injuries to a child too young to perform any services.⁶¹ Nor can the plaintiff recover

⁵⁵ Street, *Torts*, p. 396. Some American jurisdictions give a child a cause of action in such circumstances: see Prosser, *Torts*, p. 909.

⁵⁶ This is not, of course, the case in seduction.

⁵⁷ *Hall v. Hollander* (1825) 4 B. & C. 660.

⁵⁸ The preceding two sentences were cited by Cassels J. in *Lough v. Ward* [1946] 2 All E.R. 338, 346.

⁵⁹ As in *Jones v. Brown* (1794) 1 Peake 306 (assault). Cf. *Mattouk v. Massad* [1948] A.C. 588 (rape).

⁶⁰ As in *Barnes v. Pooley* (1935) 51 T.L.R. 391.

⁶¹ *Hall v. Hollander* (1825) 4 B. & C. 660. But the court left it open whether medical expenses necessarily incurred by the parent will be recovered. In

damages for the injury to his feelings, as he can in the action for seduction.

(2) Actions for enticement and harbouring

It is actionable to induce a child under age but capable of service to leave his or her parent against the latter's will, or not to return home, having so left, unless there is some justification.⁶² It is unnecessary to prove seduction: abduction is sufficient.

(3) Action for seduction

It is a tort, actionable at the suit of a master, to seduce or, *a fortiori*, to rape⁶³ his female⁶⁴ servant, and thereby to deprive him of her services. The right of a master to the services of his servant is one which the law protects not merely as against the servant himself, but also as against third persons, just as a similar protection is extended to the right of a husband to the *consortium et servitium* of his wife.

(i) Loss of service

Seduction is not, however, actionable *per se*, but only when it results in an actual loss of service. To use the technical terms of the older pleading the cause of action must be laid with a *per quod servitium amisit*. The usual cause of this loss of service is pregnancy and child-birth; but this is not essential, for any loss of service is enough if it results from the seduction in any manner not too remote—*e.g.*, illness due to mental agitation after seduction and desertion.⁶⁵ If a child is born which is not the child of the defendant,⁶⁶ or if the servant seduced leaves the plaintiff's service for some other reason before her pregnancy has caused any loss of service,⁶⁷ there is no cause of action. Even loss of service is not a cause of action if the seduction happened before the relation of master and servant

insurance practice such claims are not challenged: *Metropolitan Police District Receiver v. Tatum* [1948] 2 K.B. 68, 73; *Kirkham v. Boughey* [1958] 2 Q.B. 338.

⁶² *Evans v. Walton* (1867) L.R. 2 C.P. 615; *Lough v. Ward* [1945] 3 All E.R. 388.

⁶³ *Mattouk v. Massad* [1943] A.C. 588.

⁶⁴ No claim ever seems to have been brought in respect of the seduction of a boy: see Prosser, *Torts*, p. 906.

⁶⁵ *Manvell v. Thomson* (1826) 2 C. & P. 303.

⁶⁶ *Eager v. Grimwood* (1847) 1 Ex. 61.

⁶⁷ *Hedges v. Tagg* (1872) L.R. 7 Ex. 288.

came into existence; for the act of the defendant was not in that case the violation of any existing right vested in the plaintiff.⁶⁸ It is not necessary that the defendant should have had any knowledge that the person seduced was the servant of the plaintiff.⁶⁹

For the purpose of an action for seduction service is of three kinds, any one of which is sufficient—*viz.*, (a) contractual service, (b) *de facto* service, and (c) constructive service.

(a) *Contractual service.* Contractual service is that which is rendered under a binding contract for wages or other valuable consideration and either for a fixed term or at will. This is the ordinary case of master and servant,⁷⁰ and may, though it seldom does, exist also between a parent or other person *in loco parentis* and a daughter.

(b) *De facto service.* *De facto* service is service rendered in fact, but not under any binding contract of service. This is the ordinary relation which exists between a father or other person *in loco parentis* and a daughter who resides with him. If service is in fact habitually rendered by a daughter to her parent, there exists between them a sufficient *de facto* relation of master and servant to found an action for loss of service by seduction; and it makes no difference that the service so rendered may be quite trivial in value or nature. “Even making tea has been said to be an act of service.”⁷¹

(c) *Constructive service.* Constructive service is that which exists in the eye of the law when there is a legal right to service, though none in fact. A father is deemed for this purpose to have a legal right to the services of his children who are minors, unmarried (if daughters), and not engaged by contract to serve

⁶⁸ *Hamilton v. Long* [1905] 2 I.R. 552.

⁶⁹ *Fores v. Wilson* (1791) 1 Peake 77.

⁷⁰ Most actions for seduction are brought by parents, but an ordinary master can sue: *Mackenzie v. Hardinge* (1906) 23 T.L.R. 15.

⁷¹ *Carr v. Clarke* (1818) 2 Chit. 260, at 261, *per* Abbott C.J. The relation of *de facto* service is not excluded or terminated by temporary absence, if the *animus revertendi* still exists: *Griffiths v. Teetgen* (1854) 15 C.B. 844. When a daughter lives with her father and mother and renders domestic service in the ordinary way, this *de facto* service is with the father exclusively, and not with the mother, and the mother has no cause of action: *Beetham v. James* [1937] 1 K.B. 527.

some other person exclusively. This right of service amounts to constructive service and is therefore sufficient to ground an action provided that the two following conditions are fulfilled:—

- (i) The child must be old enough to be capable of performing acts of service ⁷²;
- (ii) The child must be either resident in the father's house or must be merely temporarily absent from it with the *animus revertendi*.

If these two conditions are fulfilled, it is not necessary in an action for seduction or other violation of a master's rights to prove any actual service, whether contractual or *de facto*, for the law will conclusively presume that service exists.⁷³ If, however, the daughter is of full age, there is no constructive service, and the father must prove either *de facto* or contractual service. And even in the case of minors constructive service is excluded by permanent absence from the father's house with no *animus revertendi*.⁷⁴

Two masters. A servant may at the same time be in the service of two different masters, and in this case each of them will have a right of action for her seduction.⁷⁵ In the case of children under age constructive service is on the same principle sufficient, although concurrent with contractual service to a third person during working hours.⁷⁶ When, on the other hand, the daughter habitually resides not with her father but with her employer, to whom she owes exclusive contractual service, no *de facto* or constructive service to her father is sufficient to give him any cause of action. Thus in *Hedges v. Tagg* ⁷⁷ a daughter engaged as a governess came back to her mother's house for a visit of three days to attend the Oxford races, and did acts of domestic service; and although she was seduced while thus at home her mother was held to have no cause of action. In these cases it makes no difference whether the parent's claim is based on *de facto* or merely on constructive service.⁷⁸

⁷² *Hall v. Hollander* (1825) 4 B. & C. 660.

⁷³ *Terry v. Hutchinson* (1868) L.R. 3 Q.B. 599.

⁷⁴ *Dean v. Peel* (1804) 5 East 45.

⁷⁵ *Rist v. Faux* (1863) 4 B. & S. 409.

⁷⁶ *Dent v. Maguire* [1917] 2 I.R. 59.

⁷⁷ (1872) L.R. 7 Ex. 288. Cf. *Whitbourne v. Williams* [1901] 2 K.B. 722.

⁷⁸ *Thompson v. Ross* (1860) 5 H. & N. 16.

(ii) *Damages*

The damages in this action are not necessarily limited to the value of the services lost. They include all expenses necessarily or properly incurred by the master in respect of his servant's illness and the birth of her child. Reasonable medical expenses, together with the cost of visiting the child in hospital, are also recoverable.⁷⁹ The damages will only be substantial if the seduction is a blow to the pride and sense of honour of happily and legally married people.⁸⁰ The damages may be aggravated if the seducer has made his advances under the guise of matrimony. But in such a case the jury must not include any damages in compensation for breach of promise of marriage; for such damages belong to the woman and not to her employer. Exemplary or vindictive damages cannot now be awarded in this class of action.⁸¹ The cost of maintenance of any child that may be born, even though it is not a legal obligation on the plaintiff to maintain it, may be taken into account by the jury.⁸² On the other hand the measure of damages may be affected by the character and conduct of the girl. General levity of character and even her improper conduct or conversation may be proved in mitigation of damages.⁸³ It is also a mitigation that the plaintiff has himself conduced to the wrong by his own negligence as a guardian.⁸⁴

Criticism. In all such cases, indeed, the action, though in form and in law based on the loss of service, is in substance and in fact based on the injury to the honour and feelings of the parent or other relative of the person seduced. The loss of service is simply the necessary condition which must exist before any claim for such *solatium* can be entertained. It is greatly to be desired, therefore, that the law should be put on a more rational basis, and that the real cause of action should receive legal recognition instead of being made available by means of a device which is little better than a legal fiction.⁸⁵

⁷⁹ Law Reform Committee, 11th Report, p. 9.

⁸⁰ *Beetham v. James* [1937] 1 K.B. 527, 533.

⁸¹ See below, § 204.

⁸² *Flynn v. Connell* [1919] 2 I.R. 427.

⁸³ *Verry v. Watkins* (1836) 7 C. & P. 308.

⁸⁴ *Reddie v. Scoolt* (1795) Peake 316.

⁸⁵ This sentence was cited with approval by Fullagar J. in *Att.-Gen. for N.S.W. v. Perpetual Trustee Co. Ltd.* (1952) 85 C.L.R. 237, at 288. As

§ 146. Husband and Wife **

Injuries to the husband

At the present day the interest which a husband has in the companionship and services of his wife is protected against the interference of strangers in four distinct ways.⁸⁷

(i) Action for loss of services

It is a tort actionable at the suit of a husband to take away, imprison, or do physical harm to his wife, if (i) the act is wrongful as against the wife, and (ii) the husband is thereby deprived of her society or services. A husband has a right as against third persons to the *consortium et servitium* of his wife, just as a master has a similar right to the *servitium* of his servant. Any tortious act, therefore, committed against the wife is actionable at the suit of her husband, if he can prove that he was thereby deprived for any period of her society or services (*per quod consortium amisit* or *servitium amisit*).⁸⁸

Distinct from enticement. It will be noted that the husband's remedy is not limited to cases where he has been deprived of his wife's *consortium* by reason of the defendant's enticement, although the tort is often called by that name. Any wrongful act which deprives him of his wife's *consortium* entitles him to sue. Such an action, moreover, depends on entirely different principles from those on which the action of enticement is founded. The latter is founded (or at any rate justifiable) on the principle that the violation of a legal right committed knowingly is a cause of action⁸⁹; the former is a relic of the proprietary rights a

the note to *Grinnell v. Wells* (1844) 7 Man. & G. 1033, at 1044, remarks: "The *quasi* fiction of *servitium amisit* affords protection to the rich man, whose daughter occasionally makes his tea, but leaves without redress the poor man whose child is sent, unprotected, to earn her bread amongst strangers." The law has been altered in Ontario, Alberta and Saskatchewan: *Brownlee v. MacMillan* [1940] A.C. 802, and the Law Reform Committee (11th Report, pp. 8-10), has suggested alteration in England.

⁸⁸ See Parsons, "Torts Affecting Domestic Relations" (1953) 2 Univ. of W.A. Ann. L. Rev. 591; Fridman, "Consortium as an Interest in Torts" (1954) 32 Can. Bar Rev. 1065; Brett, "Consortium and Servitium" (1955) 29 Austr. L.J. 321, 389, 428.

⁸⁷ The Law Reform Committee (11th Report, pp. 8-10), has recommended the abolition of these actions.

⁸⁸ The first and third sentences of this paragraph were cited by Street C.J. in *Smev v. Tibbetts* (1953) 53 S.R. (N.S.W.) 391, at 392.

⁸⁹ *Best v. Samuel Fox Ltd.* [1952] A.C. 716, 729.

husband was once thought to possess in his wife.⁹⁰ If the matter had arisen for decision in this century the courts would almost certainly have refused to give an action to the husband merely for loss of *consortium* due to the negligence of a third party, but it is too late now for the courts to deny an action which has existed for hundreds of years.⁹¹

Distinct from wife's own claim. The two causes of action thus vested in a wife and her husband respectively are concurrent and cumulative. Thus if a married woman suffers physical harm in a railway accident, the company is liable in two actions—one at the suit of the wife for the damage so sustained by herself, and another at the suit of the husband alone for the injury done to him. These two actions may be brought separately or together.⁹² The husband's action is quite distinct from any claim which his wife may have. He is not affected by her contributory negligence (if any) and he recovers his damages in full.⁹³ The proprietary basis of the action is prominent here, for the husband recovers even if he is ten thousand miles away at the date of the accident: proximity has nothing to do with it. On the other hand, the result of the decision in *Baker v. Bolton*⁹⁴ is that if the wife is not merely injured but killed, the husband's claim for loss of *consortium et servitium* is limited to the interval between her injury and her death. But he may have a claim to compensation for her death under the Fatal Accidents Acts, or even at common law if the cause of her death was a breach of contract as between himself and the defendant.⁹⁵ The action for loss of *consortium* should also be distinguished from any claim which

⁹⁰ Petruchio's remarks in *The Taming of the Shrew*, III, ii, vividly express the attitude of the common law:

"I will be master of what is mine own:
She is my goods, my chattels; she is my house,
My household stuff, my field, my barn,
My horse, my ox, my ass, my any thing;
And here she stands, touch her whoever dare
I'll bring mine action on the proudest he
That stops my way in Padua."

⁹¹ [1952] A.C. at 783.

⁹² *Brockbank v. Whitehaven Ry.* (1862) 7 H. & N. 834.

⁹³ *Mallett v. Dunn* [1949] 2 K.B. 180. See above, § 96.

⁹⁴ (1808) 1 Camp. 493. See below, § 147.

⁹⁵ *Jackson v. Watson & Sons* [1909] 2 K.B. 193.

the husband may have in respect of a tort committed against him as a direct result of which his wife leaves him.⁹⁶

Damage. Although the action *per quod consortium et servitium amisit* is one of trespass and not case, damage to the husband is the gist of the action.⁹⁷ Hence when there is no loss of *consortium et servitium* the husband will recover no, or no more than nominal damages, as when he was at the time of the act complained of permanently separated from his wife.⁹⁸ It is uncertain whether an action will lie for the impairment as distinct from the loss of *consortium*.⁹⁹ The solution may be found when the true meaning of the term is ascertained. This is not an easy task. It has been said to be "a name for what the husband enjoys by virtue of a bundle of rights some hardly capable of precise definition."¹ Sometimes it has been used by itself and sometimes in conjunction with such a term as *servitium* or assistance. It is not clear what these terms add to the meaning of the word standing alone. The problem may be solved more easily if we remember that the principle governing all cases is that the special damage which the husband has suffered must be confined to material or temporal loss capable of estimation in money. So whether the deprivation of *consortium* be total or partial, a distinction may be drawn between the services which a wife renders to her husband in the conduct of his household and the education of his children and those more intangible benefits of society, companionship and affection which normally accompany married life. The former are "of material value, capable of being estimated in money. . . . It is to the protection of such material interests that the law chiefly attends."² The latter—although their deprivation may well result in mental pain and

⁹⁶ *Cameron v. Nottingham Insurance Co. Ltd.* [1958] S.A.S.R. 174.

⁹⁷ *Toohey v. Hollier* (1955) 92 C.L.R. 618.

⁹⁸ *Izard v. Izard* (1889) 14 P.D. 5.

⁹⁹ There are decisions against such an action in Ireland (*Spaight v. Dundon* [1961] I.R. 201), and in Canada (*Bates v. Fraser* (1963) 38 D.L.R. (2d) 80), but in favour of it in Australia: *Toohey v. Hollier* (1955) 92 C.L.R. 618.

¹ [1952] A.C. at 736, *per Lord Reid*.

² *Lynch v. Knight* (1861) 9 H.L.Cas. 577, at 598, *per Lord Wensleydale*, approved by Lord Goddard in *Best v. Samuel Fox Ltd.* at 738. See also *Smev v. Tibbetts* (1953) 53 S.R.(N.S.W.) 39; *Sellars v. Best* [1954] 1 W.L.R. 913, 919; *Montreal Tramways v. McGuire* [1954] 1 D.L.R. 588.

anxiety to the husband—are not.³ Hence if a husband can prove that he has suffered definite and substantial loss of a material kind because of the greatly reduced capacity of his wife to perform the domestic duties, manage the household affairs, and give him her support and assistance, he is entitled to damages, even though her injuries have not deprived him entirely of her physical presence and society.⁴ He may also be entitled to recover damages for earnings lost as a result of being with his wife during her illness,⁵ as well as medical expenses,⁶ and the cost of visiting her in hospital, at any rate if the visits help her to recover and so mitigate the damage flowing from the loss of *consortium*.⁷ It is possible that if the husband's loss is of a temporal kind (*e.g.*, absolute deprivation of sexual intercourse), he can recover for it even though he has not been obliged to incur expenditure in consequence.⁸

(ii) *Harbouring a wife*

It is actionable to harbour the wife of another after a request by the husband to deliver her up, although the defendant did not procure her to leave her husband or know when he took her in that she was the wife of another,⁹ provided that loss of *consortium* is proved.¹⁰ It has been held “on principles of humanity” to be a defence that owing to the husband's conduct the wife is justified or (perhaps) is honestly believed by the defendant to be justified in leaving her husband.¹¹

³ Yet in *Hare v. British Transport Commission* [1956] 1 W.L.R. 250 Lord Goddard awarded £20 to the husband in addition to special damages for such expenses as he was obliged to incur by reason of his wife's absence. See also *McNeill v. Johnstone* [1958] 1 W.L.R. 888 (£30).

⁴ *Toohey v. Hollier* (1955) 92 C.L.R. 618.

⁵ *Kirkham v. Boughey* [1958] 2 Q.B. 338; *McNeill v. Johnstone* [1958] 1 W.L.R. 888.

⁶ *Best v. Samuel Fox Ltd.* [1952] A.C. 716.

⁷ *McNeill v. Johnstone* [1958] 1 W.L.R. 888.

⁸ *Birch v. Taubmans Ltd.* (1957) 57 S.R.(N.S.W.) 93.

⁹ *Winsmore v. Greenbank* (1745) Willes 577. Brett, 25 Austr.L.J. 328, doubts whether a request to deliver up is necessary.

¹⁰ *Winchester v. Fleming* [1958] 1 Q.B. 267 (in which Devlin J. reviewed the history and policy of the action). *Quaere* what the position is if the wife would not have returned to her husband in any event.

¹¹ *Philp v. Squire* (1791) Peake 114; *Berthon v. Cartwright* (1796) 2 Esp. 480; *Place v. Searle* [1932] 2 K.B. 497, 513, 517. Even under the old writ of ravishment the defendant was not liable if he conducted the wife on a pilgrimage or took her into his house when she was “in danger of being lost in the night or of being drowned with water”: Brooke, *Abridg. s.v. Trespass*, p. 207, 213.

(iii) *Enticement*

In the absence of lawful justification, it is a tort actionable at the suit of a husband to induce his wife to leave him or to remain away from him against his will.¹² A husband has no longer, indeed, any right or power, whether by way of judicial proceedings or otherwise, of compelling his wife to live with him.¹³ But it is still the duty of the wife to reside and consort with her husband, and the husband has a right of action for damages against any person who procures, entices or persuades her to violate this duty.¹⁴ It has been said that the action is out of date, and will not lie against a mother-in-law¹⁵; but it has certainly been held to lie against a brother and a brother-in-law,¹⁶ and its existence was expressly approved by three of the Law Lords in *Best v. Samuel Fox Ltd.*¹⁷ Mere advice is not sufficient to make the defendant liable. The difference between advice and persuasion is one of degree. In *Place v. Searle*¹⁸ it was held that the words "Come on, Gwen! We will go," might in the circumstances of that case amount to persuasion. The husband need not prove that the will of the wife was overborne by the stronger will of the enticer. It is, however, a sufficient justification for such enticement that owing to the husband's conduct the wife is justified, or (it would seem) honestly believed by the defendant to be justified, in leaving her husband.¹⁹

(iv) *The action for "criminal conversation"*

An action (whether of trespass or case is uncertain)²⁰ lay against one who had committed adultery with the wife of the plaintiff. It was known as an action for criminal conversation.²¹

¹² *Winmore v. Greenbank* (1745) Willes 577; *Smith v. Kaye* (1904) 20 T.L.R. 261.

¹³ *R. v. Jackson* [1891] 1 Q.B. 671. *Quære* whether an action for harbouring would not have lain against the relatives in this case.

¹⁴ *Place v. Searle* [1932] 2 K.B. 497. Note that one may entice a wife away without harbouring her in one's home.

¹⁵ Lord Denning in *Gottlieb v. Gleiser* [1958] 1 Q.B. 267n.

¹⁶ *Smith v. Kaye* (1904) 20 T.L.R. 261.

¹⁷ [1952] A.C. 716 (Lords Goddard, Oaksey and Reid).

¹⁸ [1932] 2 K.B. 497. See also below, § 151.

¹⁹ *Berthon v. Cartwright* (1796) 2 Esp. 480; *Philp v. Squire* (1791) 1 Peake 114.

²⁰ *Jones Bros. (Hunstanton) Ltd. v. Stevens* [1955] 1 Q.B. 275.

²¹ *Norfolk (Duke of) v. Germaine* (1692) 12 St.Tr. 929 is the first reported action of this kind. The plaintiff alleged that the defendant had "by lascivious conversation" committed adultery with the duchess, and claimed £100,000 damages. The jury were severely reprimanded by Holt C.J. for awarding £66 18s. 4d.

The wife's consent was irrelevant. The action was distinct from that of enticement: one may commit adultery without enticing a wife away from her husband.²² The action was no doubt a necessity when divorce could only be obtained by Act of Parliament: as Parliament was not a tribunal suitable for trying allegations of adultery it was reasonable to require the petitioner to establish the truth of his allegations before a court of law. But when the Divorce Court was established in 1857 the reason for the action disappeared and it was accordingly abolished. Today a husband's claim for damages for adultery is made by way of petition under the Matrimonial Causes Act, 1950,²³ whether accompanied by a petition for divorce or not. The governing principles are in general the same as those for the crim. con. action.

Injuries to the wife

(i) *Enticement*

No action will lie against another woman by a wife for adultery committed with her husband.²⁴ But she can sue a third person who entices, procures or persuades him to cease from consorting with her.²⁵ "A wife is entitled to enjoy the society, comfort and protection of her husband and to be maintained by him, and if another entices him from her so that she is bereft of those benefits she is as much entitled to claim damages as is a husband whose wife is for any reason, save humanity, abducted or persuaded to leave his home."²⁶ Moreover, there is some authority for saying that where a tort committed against a wife produces, as its intended or natural result, a loss of the *consortium* of her husband, this is to be taken into account in estimating damages: for example, a slander published against a wife with the result that her husband refuses to live with her.²⁷

²² *Newton v. Hardy* (1933) 149 L.T. 165; *Elliott v. Albert* [1934] 1 K.B. 650.
²³ s. 30.

²⁴ *Newton v. Hardy* (1933) 149 L.T. 165.

²⁵ This cause of action is given statutory recognition by the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1).

²⁶ *Best v. Samuel Fox, Ltd.* [1952] A.C. 716, at 729-780, per Lord Goddard C.J. See *Gray v. Gee* (1923) 89 T.L.R. 429; *Newton v. Hardy* (1933) 149 L.T. 165; *Welton v. Broadhead* [1958] O.L.Y. 9297.

²⁷ *Lynch v. Knight* (1861) 9 H.L.C. at 589, per Lord Campbell; at 595, per Lord Cranworth; *Lampert v. Eastern National Omnibus Co., Ltd.* [1954] 1 W.L.R. 1047; *Cameron v. Nottingham Insurance Co., Ltd.* [1958] S.A.S.R. 174.

(ii) *Loss of consortium*

But a married woman has no right of action against a person who by a negligent act or omission has deprived her of her husband's society or services. This claim was put forward (apparently for the first time) in *Best v. Samuel Fox, Ltd.*,²⁸ in which the plaintiff's husband had, by reason of the defendant's negligence, suffered injuries the effect of which was to deprive the plaintiff of the opportunity of having normal marital relations. It was argued that in modern conditions it was anomalous to grant such an action to the husband and refuse it to the wife. But the House of Lords held that the real anomaly today was the husband's right of action for loss of his wife's *consortium* and that there was no reason for extending such an anomaly.²⁹ On the other hand, for the death of her husband a wife, if dependent, may claim compensation under the Fatal Accidents Acts.³⁰

(iii) *Harbouring*

A similar approach was adopted in *Winchester v. Fleming*,³¹ in which it was held that the action for harbouring a spouse did not lie at the suit of a wife. The action was an anomaly when brought by a husband,³² and there was no reason to extend the anomaly further.

§ 147. Death of Relatives

At common law it was not a civil wrong to cause the death of a human being. Lord Ellenborough C.J. in 1808 in *Baker v. Bolton*³³ laid down the rule: "In civil court the death of a human being cannot be complained of as an injury." So although a husband could sue at common law for any wilful or negligent harm done to his wife whereby he was temporarily deprived of her

²⁸ [1952] A.C. 716.

²⁹ Most American jurisdictions now give the wife a cause of action: Prosser, *Torts*, p. 918.

³⁰ See below, § 147.

³¹ [1958] 1 Q.B. 259. This decision was reversed in the C. A. ([1958] 8 All E.R. 51) on another ground—a point not mentioned in the *Law Reports*.

³² See above, pp. 507–508.

³³ 1 Camp. 493. See Holdsworth, "The Origin of the Rule in *Baker v. Bolton*" (1916) 82 L.Q.R. 431; 83 L.Q.R. 107–109; Holdsworth, H.E.L., 3rd ed., iii, pp. 381–386, 576–588; Report of Law Revision Committee (1934, Cmd. 4540).

society or services, he could not sue in respect of that permanent deprivation which he suffered by reason of her death.³⁴ A father's rights in respect of his children were similarly limited. Thus in *Osborn v. Gillett*³⁵ a father sued at common law^{35a} for the death of his daughter, who had been negligently run over and killed by the defendant. The defendant pleaded that the deceased had been killed on the spot and therefore that the plaintiff had not been deprived of the services of his daughter otherwise than by her death; and it was held that the plea was good. Had the death ensued after an interval only, the plaintiff would have had a good cause of action for loss of service during that interval,³⁶ but none in respect of the death. In *Jackson v. Watson and Sons*,³⁷ however, it was decided that this rule does not apply in an action for breach of contract, but is limited to cases of pure tort. But when the breach of a contract made with the plaintiff results in the death of some third person in whose life the plaintiff has an interest, the damages recoverable in an action of contract will, it seems, include any pecuniary loss resulting, not too remotely, from that death. Thus in *Jackson v. Watson & Sons, Ltd.*, a husband, in an action for breach of warranty in a contract of sale, recovered damages (independently of the Fatal Accidents Act) for the death of his wife caused by eating certain poisonous food sold to him by the defendants. In other words, the killing of a human being, although not itself a cause of action, may be taken into account in assessing damages for an independent cause of action in contract. The result is anomalous. A woman travelling in a

³⁴ *Baker v. Bolton* (1808) 1 Camp. 493. The reporter of Lord Ellenborough's decisions at Nisi Prius was the future Lord Campbell, who in his *Life* (ii, p. 215), after paying tribute to the high judicial qualities of the Chief Justice, said: "When I arrived at the end of my fourth and last volume, I had a whole drawer full of 'bad Ellenborough law'." If Lord Campbell had put *Baker v. Bolton* into that drawer he would have earned the gratitude of later generations—though then he would not have given his name to a statute.

³⁵ (1879) L.R. 8 Ex. 88.

^{35a} It does not appear from the report why the action was not brought under the Fatal Accidents Act. Under this Act damages could in such a case be recovered to the extent of the value of the daughter's gratuitous services to her father: *Berry v. Humm & Co.* [1915] 1 K.B. 627.

³⁶ As in *Baker v. Bolton* itself.

³⁷ [1909] 2 K.B. 193.

motor-coach is so injured as the result of the driver's negligence that she dies. If the woman bought the ticket herself, her husband has no claim, unless he has one under Lord Campbell's Act, because it would be a mere claim in tort and would fall within the rule. If, however, the husband bought his wife the ticket, he can claim in contract for medical expenses, etc., as well as for loss of service.

We shall see³⁸ that the Law Reform (Miscellaneous Provisions) Act, 1934, abolished the effect of the maxim *actio personalis moritur cum persona*. But that rule is entirely distinct from the rule in *Baker v. Bolton*, which deprives other persons than the deceased of any remedy where they have suffered damage as the result of the death. The latter rule seems to be based, in so far as it refers to inability to recover for the loss of services by the infliction of death, on the principle that a trespass is merged in a felony, a reason inadequate in Lord Ellenborough's time, and now obsolete.³⁹ It is probable that it was introduced into the law owing to a confusion of the *actio personalis* maxim with the principle that no action will lie for a tort which is also a felony until the felon has been prosecuted, a principle which will not support the rule in its present wide form. "If the rule is really based on the relevant death being due to felony," said Lord Atkin,⁴⁰ "it should long ago have been relegated to a museum: for deaths by negligence are often not felonious, and where they happen more than a year and a day after the wrongful act cannot be." But although the rule may be both unjust and technically unsound, it is the present law of England, for it was affirmed by the House of Lords in *Admiralty Commissioners v. S.S. Amerika*.⁴¹ "We can only regard the decision as perhaps the strongest illustration which we have in our books of the manner in which *communis error* sometimes *facit jus*."⁴² Although its abolition was recommended by the Law Revision Committee⁴³ the Government felt it would

³⁸ Below, § 184.

³⁹ In any event the civil remedy is only suspended, not extinguished: *Rose v. Ford* [1937] A.C. 826, 846.

⁴⁰ *Rose v. Ford* [1937] A.C. at 834. Cf. Lord Wright at 847.

⁴¹ [1917] A.C. 38.

⁴² Holdsworth, H.E.L., Vol. iii, pp. 336, 667.

⁴³ Cmd. 4540, s. 15 (e).

be difficult to allow an employer to recover for the death of his servant without also making provision for the converse situation.⁴⁴ We shall deal later with the statutory exceptions to the rule in *Baker v. Bolton* created by the Fatal Accidents Acts, 1846 to 1959.⁴⁵

⁴⁴ Hutton, "Mechanics of Law Reform" (1961) 24 M.L.R. 16, 23.

⁴⁵ See below, § 231.

INJURIES TO ECONOMIC RELATIONS

§ 148. Introductory

Trade competition

It is as uncertain now as it was in 1906 or indeed at any date in the history of the common law whether it is a tort for a single person maliciously to interfere with the trade business or employment of another if his conduct does not fall under one of the known heads of tort, such as inducement of breach of contract. Although it is now settled that if two or more do this, they may be liable for conspiracy,¹ it is also clear that so far as a single defendant is concerned there is a chasm between inducing a breach of contract and inducing a person not to enter into a contract.² The problem may be put in another way by asking whether the common law protects mere expectancies as distinct from promised advantages. Perhaps the clearest illustration of the conduct which might be actionable if such a tort existed is to be found in the American case of *Tuttle v. Buck*,³ in which the plaintiff, who had carried on his hair-dressing business in a small town for many years, incurred the enmity of the defendant, a wealthy man, who deliberately set up a rival establishment in the same town with the sole object of driving the plaintiff out of business by under-cutting his rates—as in fact he did. The court held that an action lay. In other words, what the plaintiff is trying to establish in such a case is “*Quinn v. Leathem* without the conspiracy.”⁴ Sir John Holt in 1705 and Sir William Erle in 1869 suggested that such an action might lie⁵ and the following Law Lords were not positively against it:

¹ See below, § 152.

² Lord Herschell's dictum to this effect in *Allen v. Flood* [1898] A.C. 1, 121, was expressly approved in *Rookes v. Barnard* [1964] A.C. 1129, 1168, 1234, by Lords Reid and Pearce.

³ (1909) 107 Minn. 145, 119 N.W. 946. The many American cases, which increasingly favour liability, are discussed in Prosser, *Torts*, pp. 973-995.

⁴ Lord Devlin's phrase in *Rookes v. Barnard* [1964] A.C. 1129, 1216.

⁵ *Keeble v. Hickeringill* (1705) 11 East 573n., 575; Erle, *Trade Unions* (1869), p. 12. This was the view of 6 of the High Court judges summoned to advise in *Allen v. Flood* [1898] A.C. 1, and of Lord Lindley in *Quinn v. Leathem* [1901] A.C. 495, 537.

Lord Loreburn in *Conway v. Wade*,⁶ Lords Cave, Atkinson and Sumner in *Sorrell v. Smith*,⁷ and Lord Devlin in *Rookes v. Barnard*.⁸ On the other hand Lord Dunedin described this view as "the leading heresy,"⁹ and Lord Donovan in *Stratford and Son, Ltd. v. Lindley*¹⁰ also opposed it. But the draftsman of the second limb of section 8 of the 1906 Act clearly assumed that deliberate interference with trade business or employment without lawful justification might be held to be a tort.¹¹ If it be said that this view is untenable since *Allen v. Flood* and *Sorrell v. Smith* ("the leading heresy,")¹² the reply given in *Rookes v. Barnard*¹³ is that this was uncertain in 1906 and Parliament was putting in a provision which would be necessary if the law went one way but unnecessary if it went the other way.

The fundamental case is *Allen v. Flood*.¹⁴ Flood and Taylor were shipwrights employed "for the job" by the Glengall Iron Company. Some iron men who also worked for the Company objected to the employment of shipwrights and Allen, a Trade Union Official acting on their behalf, informed the company's manager that unless Flood and Taylor were dismissed the men would "knock off work, or be called out." (It was uncertain exactly which phrase he used.) Flood and Taylor thereupon were lawfully dismissed by the Glengall Company at the end of the day. A majority of the House of Lords held that they had no cause of action against Allen. No unlawful act had been committed by him and there was no conspiracy. The fact that his motives might have been malicious made no difference. "At the end of the day all that *Allen v. Flood* decides is that where there is no element of combination so far as the individual is concerned what he does is either lawful or unlawful; if it is unlawful it is not saved by good intentions, and if it is lawful it is not made unlawful by reason of malice on his part."¹⁵

⁶ [1909] A.C. 506, 511.

⁷ [1925] A.C. 700, 713, 739.

⁸ [1964] A.C. 1129, 1215.

⁹ *Sorrell v. Smith* [1925] A.C. 700, 719.

¹⁰ [1965] A.C. 289, 340.

¹¹ See [1964] A.C. 1129, 1177, 1216, and Hoffman in 81 L.Q.R. 116 on the parliamentary history of the section.

¹² [1925] A.C. 700, 719.

¹³ [1964] A.C. 1129, 1216.

¹⁴ [1898] A.C. 1.

¹⁵ Lord Gardiner Q.C., *arguendo*, in *Rookes v. Barnard* [1963] 1 Q.B. 623, at 645.

Is there any ground on which *Allen v. Flood* can be got out of the way? So long as it stands it is hard to see how there can be any general theory of liability for unfair trade competition. It might be distinguished on one of two grounds:

First, it might be said that *Allen* was a mere messenger with no control over the event and not uttering any threat or inducement of his own. The difficulties in this view will be pointed out.¹⁶

Secondly, it might be said that the plaintiffs had only a common law right as distinct from a statutory permit. This was the view adopted by the Supreme Court of Canada in *Roncarelli v. Duplessis*.¹⁷

It is now clear that the losing side in *Allen v. Flood* went wrong in concentrating on the interest infringed. They should have concentrated on the defendant's conduct and argued for a wider definition of "unlawful."¹⁸ For it is hard to imagine that an English court could ever be induced to hold that trade competition was wrongful if a judge or jury thought it was unreasonable. The objections to such a course were convincingly pointed out by Bowen L.J. in the *Mogul* case.¹⁹ If a plaintiff wishes protection against unreasonable trade competition he must obtain a patent or else a statutory monopoly authorised by the Restrictive Practices Act, 1956.

So far as is possible to find a common element in all the cases on trade competition it seems to be that the defendant has used a third person to harm the plaintiff.²⁰ There must be a response to the threat to commit, or the actual commission of an unlawful act in conspiracy, nuisance,²¹ procurement of breach, and intimidation, or the third person must have been tricked into acting in a way detrimental to the plaintiff in deceit, slander of title, or passing-off. "This is not surprising. One can bloody one's neighbour's nose unaided, but to ruin him usually requires assistance; the defendant in the economic torts

¹⁶ See below, p. 522.

¹⁷ [1952] 1 D.L.R. 680.

¹⁸ See below, § 150.

¹⁹ (1893) 23 Q.B.D. 598, 613.

²⁰ See *Silkin arguendo* [1963] 1 Q.B. 632, at 652.

²¹ Note that the fact that the plaintiff is a trader is not essential to liability, although it affords evidence of damage. If one obstructs the right of access to my yacht, I have an action, although I use it entirely for pleasure: Lord Davey in [1898] A.C. 1, 173.

is commonly Iago, not Jehu.”²² The essence of the tort is that the defendant is seeking to prescribe the third party’s conduct in respect of the plaintiff.²³ But, paradoxically enough, if the defendant deprives the plaintiff of his customers by killing them he is not liable: this is not one of the relational interests protected by the Fatal Accidents Acts.

Strikes and the law

At the outset attention should be directed to two difficult questions of terminology—“the right to strike” and “threats.”

“The right to strike.”

This is a loose phrase, for there is no right in the strict sense of the term—i.e. a claim to which there is opposed a duty. The phrase really means immunity from the ordinary criminal and civil processes.²⁴ Since the Conspiracy and Protection of Property Act, 1875, a strike has (with the exception of certain essential industries) been lawful from the stand-point of the criminal courts. Whether a strike is lawful from the point of view of the Law of Torts or Contracts is a different question. It is best first of all to define what one means by “a strike.”

“A strike.”

A man is always entitled to terminate his employment by giving lawful notice. This is fundamental in a free society—unless Parliament for sufficient reasons (e.g., war time, or the creation of a status such as that of a dock labourer under the Dock Labour Scheme) has deprived the workman of the right, or he has himself bargained it away by entering into a non-strike agreement, as happened in *Rookes v. Barnard*.²⁵ It is, however, not very helpful to use the word in this sense.²⁶ An assumption that a man will give proper notice to terminate his employment is not really at the basis of the phrase “the right to strike.” The phrase has some connotation of illegality or unlawfulness.

A strike more usually and properly means the concerted withdrawal of all or some part of labour by the men.²⁷ A strike

²² Weir, Note, [1964] C.L.J. 225, 227.

²³ Hamson, Note, [1964] C.L.J. 159, 165.

²⁴ *Stratford (J. T.) & Son, Ltd. v. Lindley* [1965] A.C. 269, 304.

²⁵ [1964] A.C. 1129.

²⁶ Clerk and Lindsell, *Torts*, p. 640.

²⁷ *Rookes v. Barnard* [1964] A.C. 1129 (Lords Devlin and Hodson).

is a concerted withdrawal of labour, for a strike by one man is unheard of, whether or not proper notice of withdrawal is given. It should, however, be carefully noted that normally there is no intention to bring the contract to an end for this would gravely affect pension and other rights. "Strike Notice" is not equivalent to "asking for one's cards."

It is true that the law gives to the employer the right to treat the breach as a fundamental one entitling him to regard the contract as at an end, but in fact neither party expects him to avail himself of this right. It has, therefore, been doubted whether there is necessarily anything illegal in strike notice given in such circumstances. Perhaps there is nothing illegal in "a lightning strike." Subject to this qualification, every strike must be in some sense a breach of contract.²⁸ What the men have in view is an unlawful withdrawal or threat of withdrawal of labour which the employer will not treat as a breach or as an anticipatory breach of the contract. It is a quibble to distinguish between a strike and a stoppage of labour.²⁹ A strike is a strike even if it lasts for only twenty-four hours.

A threat to work to rule unless a non-unionist is dismissed is not unlawful and even if made with the object of harming the plaintiff would be protected by section 1 of the 1906 Act.

But if the men cannot be or are not expected to be sued for damages for breach of contract, can the employer who has suffered loss by their action sue the trade union officials who have encouraged or persuaded or at least not dissuaded the men from acting as they did? The result of the cases appears to be that the trade union official is protected from an action by the employer but not from an action brought by any third party damnified by the threats of the official and the men.³⁰

"Threats."

Another difficulty arises from the word threat. It now seems clear that a threat is a pre-intimation of proposed action of some kind, and that everything depends upon whether the action proposed (with, it is understood, the object and effect of injuring

²⁸ Lord Reid in [1964] A.C. 1129, 1167.

²⁹ *Huntley v. Thornton* [1957] 1 W.L.R. 321.

³⁰ See below, §§ 149-150.

the plaintiff) is lawful or not.³¹ At one time there was a tendency to distinguish between a threat on the one hand and a notice or warning on the other hand, so that if a trade union official says "all my members have decided to embark upon this course of action," it would be a question whether he was just acting as a messenger or uttering a threat. Thus there was a tendency to explain *Allen v. Flood*³² on the ground that Allen had only communicated the intention which the men had already formed not to work for the Glengall Iron Company and was not himself threatening any course of action.³³

But it is now generally agreed that this distinction is unhelpful.³⁴ A threat is not *per se* unlawful. The distinction between unlawful and lawful threats is drawn according to the nature of the act threatened and not according to the nature of the threat. One might give proper notice of termination of a contract in the most violent language: conversely, an announcement of an intention to call out all the workers in a vital industry may be, and nowadays often is, couched in subdued tones. The conclusion is that if one may do something, one may threaten to do it. Conversely if one is not entitled to do something, one may not threaten to do it. As a workman is not entitled to break his contract of employment so he may not threaten to do so, but if in the course of a trade dispute a trade union official or an unofficial agitator is entitled to induce breaches of contract of employment, he may threaten the employer to do so, although such acts remain unlawful as against third parties.³⁵

It has been said that the threat must be a coercive one—*i.e.*, coupled with some demand, so that if my gardener tells me he is not going to dig my potatoes that is only an announcement and not a threat unless he couples it with, say, a demand for higher wages.³⁶ But this view seems to rest upon the now

³¹ The starting-point is the famous judgment of Holmes J. in *Vegeahn v. Gunter* 167 Mass. 92 (1896).

³² [1898] A.C. 1.

³³ See Lords Macnaghten, James of Hereford and Shand in [1898] A.C. 1, 150, 165, 178.

³⁴ *Hodges v. Webb* [1920] 2 Ch. 70. But see Lords Reid, Evershed and Hodson in *Rookes v. Barnard* [1964] A.C. 1129, and Lord Reid *arguendo* in *Stratford (J. T.) & Son, Ltd. v. Lindley*, *The Times*, July 2, 1964.

³⁵ See below, §§ 149–150.

³⁶ Lord Denning M.R. in *Stratford (J. T.) & Son, Ltd. v. Lindley* [1965] A.C. 269, 287.

outmoded difference between a threat and an announcement or warning. It is certainly clear that the threat may be either an "if" threat or an "unless" one. There is no difference between saying that one will break one's contract if an employer does something, and saying that one will break one's contract unless he does something.³⁷

*Stratford (J. T.) and Son, Ltd. v. Lindley*³⁸

In this case the House of Lords granted an interlocutory injunction restraining the respondents, two officials of the Watermen's Union, from doing any act which caused or procured a breach by customers of Stratfords of contracts made at present or in the future between the appellants and those customers for the hiring of the appellants' barges.

The trade union officials had interfered by imposing an embargo on their members handling any of Stratfords' barges. This embargo was effective because 8,000 of the 8,850 men in the Port of London on that work were members of the Watermen's Union. It was so effective that it cost Stratfords £1,000 a week while it was in operation.

The reason for the embargo was that fifty of the 850 non-members of the Watermen's Union were employed by Bowker & Co., a subsidiary of Stratfords. These men were members of the Transport and General Workers Union (T.G.W.U.); they were entirely satisfied with their conditions of service and there was no trade dispute between them or their Union and their employers, Bowker & Co. The dispute was in essence an inter-union one: the Watermen's Union were trying to secure exclusive membership in the Port of London, but when they sought recognition from Bowkers that recognition was withheld. The action which they took against Stratfords was without notice or warning or attempt to negotiate. They had committed the essential elements of the tort of procurement of breach of contract—they knew of the existence of the contracts between Stratfords and their customers the barge hirers or repairers; they knowingly procured breaches of them, albeit at one remove, as it were, by threatening to call out their members if the customers fulfilled their contracts; they acted with malice in law and the plaintiff was damaged. Although the Court of Appeal thought it was by

³⁷ Pearson L.J. in [1965] A.C. at 292.

³⁸ [1965] A.C. 269.

no means obvious that the defendants knew of the contracts or that they were in fact broken, the House of Lords held that there was sufficient evidence of this.

The defendants were not protected by section 8 of the 1906 Act as they were not acting in contemplation or furtherance of a trade dispute in the proper meaning of that phrase. An inter-union dispute is not a trade dispute.

Conclusion

It will be noted that the House of Lords decided the case on a ground different from that on which the Court of Appeal decided it, so that there is still no final ruling on the legality of "the right to strike," but Lord Pearce expressly said³⁹ that section 8 protected a trade union official threatening an employer to induce or procure breaches of contracts of employment by his men. The only person who could sue him for his conduct in such a situation would be the other party to the contract—*i.e.*, the employer. It is quite different when the threat of inducing such a breach is made, not with the object of persuading the employer to grant an increase of pay or some other alteration in the conditions of service, but with the object of damaging some third party—*e.g.*, Rookes. In such a case the threat amounts to unlawful means sufficient to found the tort of intimidation and perhaps also that of conspiracy and the act is not actionable "on the ground only that" it interferes with the trade or employment of the plaintiff, but on some other ground.

§ 149. The Trade Disputes Act, 1906

The common law as to intimidation, boycotting, procurement of breach of contract, and conspiracy must, in its application to trade unions and industrial warfare, be read subject to the exceptions established by the Trade Disputes Act, 1906. By section 4 it is provided that "an action against a trade union"⁴⁰ . . . in respect of any tortious act alleged to have been committed⁴¹ by or on behalf of the trade union, shall not be entertained

³⁹ [1965] A.C. at 836.

⁴⁰ Note that the immunity is given to the union as such: its members may still be sued individually: see below, § 178.

⁴¹ These words do not prevent the Court from granting an injunction to restrain apprehended injury: *Boulting Brothers v. Association of Cinematograph Television and Allied Technicians* [1963] 2 Q.B. 606.

by any court." By section 1 it is provided that "an act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable." This does not prevent actions of conspiracy, but restricts them. The injured party can sue if the act is wrongful without the allegation of conspiracy. The object of the section is to exclude the *Quinn v. Leathem*⁴² type of conspiracy, or to distinguish between wrongs that can be committed singly and wrongs that cannot. Since *Rookes v. Barnard*⁴³ so greatly widened the scope of the tort of intimidation when committed by a single person, it follows that the protection of section 1 has been withdrawn from many agreements to threaten breaches of contract which were formerly thought to be not actionable.⁴⁴

Picketing

At common law picketing may amount to nuisance⁴⁵ or intimidation.⁴⁶ It is "a murderous weapon."⁴⁷ But in most cases it will be legalised by section 2 of the Trade Disputes Act, 1906, which provides that it shall be lawful for two or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation of furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be,⁴⁸ if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working. Parliament seems to have had a rather idealised picture of a picket line in a trade dispute, but there are few cases on the section.⁴⁹

⁴² [1901] A.C. 495.

⁴³ [1964] A.C. 1129

⁴⁴ See below, § 151.

⁴⁵ *J. Lyons & Sons v. Wilkins* [1899] 1 Ch. 11.

⁴⁶ *Bird v. O'Neal* [1960] A.C. 907.

⁴⁷ *Educational Co. of Ireland, Ltd. v. Fitzpatrick (No. 2)* [1961] I.R. 345, 391.

⁴⁸ This does not authorise entry on private property against the wish of the occupier: *Larkin v. Belfast Harbour Commissioners* [1908] 2 I.R. 214, but it does legalise the use of the highway for purposes which would otherwise be trespassory: *Ferguson v. O'Gorman* [1937] I.R. 620.

⁴⁹ See *Dunne v. Fitzpatrick* [1958] I.R. 29.

Procurement and Intimidation

By section 8 it is provided that "an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable"^{49a} on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

This is a very difficult section to construe. No responsible trade unionist has ever claimed the right to commit acts amounting to (say) arson, assault, or libel, in the course of a trade dispute, but it was thought the section protected "the right to strike."⁵⁰ After much argument it was held in *Rookes v. Barnard*⁵¹ that section 8 does not prevent actions if they are based on some ground other than inducement of breach of contract, or interference with business—*e.g.*, slander, deceit, or intimidation.⁵² To put it in another way, the immunity given by section 8 to procurements of breaches of contract of employment⁵³ does not mean that such breaches are legalised or even made non-actionable: they may amount to wrongful means for the torts of intimidation or conspiracy.⁵⁴ In any case, it is clear that the same construction must be given to both limbs of the section.

Some of the difficulties can be resolved if two points are borne in mind.

First, that "not actionable" in section 8 probably means "not actionable by the other party to the contract the breach of which is induced or procured"⁵⁵: the breach or its procurement remain actionable at the suit of any third party who is able to build a cause of action—*e.g.*, intimidation—upon them.

^{49a} Nor will an injunction lie: *Camden Exhibition Ltd. v. Lynott, The Times*, May 19, 1965.

⁵⁰ See above, § 148.

⁵¹ [1964] A.C. 1129.

⁵² The decision also vastly widened the scope of the tort of intimidation by holding that it extended to breaches of contracts as well as torts or crimes: see below, § 150.

⁵³ Note that the section does not protect breaches of contracts other than contracts of employment—*e.g.*, contracts of hire: *Stratford (J. T.) & Son, Ltd. v. Lindley* [1965] A.C. 269.

⁵⁴ See Pearson L.J. in *Stratford (J. T.) & Son, Ltd. v. Lindley* [1965] A.C. 269, 298.

⁵⁵ *Stratford (J. T.) & Son, Ltd. v. Lindley* [1965] A.C. 269, 336.

Secondly, that neither section 8 nor section 4 exempt from action the actual breaches of contract by the employees. The position would be very different if section 8 read "on the ground only that it [is a breach of a contract or] induces some other person to . . ." No doubt in practice no employer thinks of suing for damages his men who are out on strike, but their acts remain wrongful.

Finally, it should be noted that disputes between one employer and another employer are not within the statutory definition of a trade dispute.⁵⁶ Nor are disputes between an employer and a union whose members do not consist of "workmen,"⁵⁷ or disputes between one union and another which are simply inter-union squabbles about recognition.⁵⁸

§ 150. Intimidation ⁵⁹

The wrong of intimidation includes all those cases in which harm is inflicted by the use of unlawful threats whereby the lawful liberty of others to do as they please is interfered with. This wrong is of two distinct kinds, for the liberty of action so interfered with may be either that of the plaintiff himself, or that of other persons with resulting damage to the plaintiff. In other words, the defendant may either intimidate the plaintiff himself, and so compel him to act to his own hurt, or he may intimidate other persons, and so compel them to act to the hurt of the plaintiff. There is an analogy with fraud and injurious falsehood, in which the defendant may either deceive the plaintiff himself or else deceive other persons to the plaintiff's injury.

⁵⁶ As defined in s. 5 (3) means "any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person."

⁵⁷ See the robust decisions of the Irish Courts reviewed by Delany, "Immunity in Tort and the Trade Disputes Act" (1955) 18 M.L.R. 338; *ibid.* 19 M.L.R. 310.

⁵⁸ *Stratford (J. T.) & Son, Ltd. v. Lindley* [1935] A.C. 269.

⁵⁹ See Wedderburn, "The Right to Threaten Strikes" (1961) 24 M.L.R. 572; (1962) 25 M.L.R. 513; *ibid.* "Intimidation and the Right to Strike" (1964) 27 M.L.R. 257; Rideout, "*Rookes v. Barnard*" (1964) 3 The Solicitor 193; Hamson, Note, [1964] C.L.J. 159; Hoffmann, "*Rookes v. Barnard*" (1965) 81 L.Q.R. 116.

(1) Intimidation of the plaintiff himself

A. *By illegal acts*

Although there seems to be little authority on the point,⁶⁰ it cannot be doubted that it is an actionable wrong intentionally to compel a person, by means of a threat of an illegal act, to do some act whereby loss accrues to him: for example, an action will doubtless lie at the suit of a trader who has been compelled to discontinue his business by means of threats of personal violence made against him by the defendant with that intention.⁶¹ So where A uses force to prevent B from carrying out his contract with C, A can be sued for intimidation by B and for procurement of breach of contract by C.⁶²

It is probable that the plaintiff may sue for intimidation if the illegal act with which he is threatened is to be committed not against himself but against some third party—*e.g.*, a threat to assault or libel or procure the breach of contract of some customer.⁶³

B. *By legal acts*

On the authorities as they stand, it is clear that the threat complained of must be a threat to do an act which is in itself illegal. No threat to exercise one's legal rights can amount to a cause of action, even if made for the purpose of intimidation or coercion, and even if inspired by malicious motives. To decide otherwise would mean overruling a clear decision of the House of Lords,⁶⁴ or at least distinguishing it on some ground which is not obvious. This has many consequences. English law permits a wealthy company to drive its competitors out of the field by under-cutting prices to an uneconomic level,⁶⁵ or an essential servant to threaten to leave unless his wages are substantially increased, or another servant, whom he dislikes, is lawfully

⁶⁰ Apart from a dictum of Hawkins J. in *Allen v. Flood* [1898] A.C. 1, 17, and the decision in *The Tubantia* [1924] P. 78 (rival salvors molesting plaintiff's servants).

⁶¹ This sentence was cited with approval by Lord Devlin in *Rookes v. Barnard* [1964] A.C. 1129, 1205.

⁶² *Williams v. Hursey* (1959) 103 C.L.R. 30, 77.

⁶³ This seems a legitimate deduction from the imposition of liability on Silverthorne in *Rookes v. Barnard* [1964] A.C. 1129 (see below, p. 530) and the decision of the Court of Appeal in *Stratford & Son, Ltd. v. Lindley* [1965] A.C. 269.

⁶⁴ *Allen v. Flood* [1898] A.C. 1.

⁶⁵ See below, § 151.

dismissed.⁶⁶ In such cases it makes no difference that the threat is couched in menacing and disagreeable language: for if one may lawfully do a thing, one may threaten to do it.⁶⁷ But, as we shall see, it may be different if two or more are involved.

(2) Intimidation of other persons to the injury of the plaintiff

In certain cases it is an actionable wrong to intimidate other persons with the intent and effect of compelling them to act in a manner or to do acts which they themselves have a legal right to do which cause loss to the plaintiff: for example, the intimidation of the plaintiff's customers whereby they are compelled to withdraw their custom from him,⁶⁸ or the intimidation of an employer whereby he is compelled to discharge his servant, the plaintiff. Intimidation of this sort is actionable, as we have said, in certain classes of cases; for it does not follow that, because a plaintiff's customers have a right to cease to deal with him if they please, other persons have a right as against the plaintiff to compel his customers to do so. There are at least two cases in which such intimidation may constitute a cause of action:

- (i) When the intimidation consists in a threat to do or procure an illegal act;
- (ii) When the intimidation is the act, not of a single person, but of two or more persons acting together in pursuance of a common intention.⁶⁹

(i) Intimidation by threats of illegal act

Any person is guilty of an actionable wrong who, with the intention and effect of intimidating any other person into acting in a certain manner to the harm of the plaintiff, threatens to commit or procure an illegal act.

For many years the very existence of this form of intimidation was in doubt, and it was suggested that the cases were explicable on some other ground—*e.g.*, Nuisance. This was true of some of the cases but not of two of the leading ones, *Garrett v. Taylor*⁷⁰ and *Tarleton v. M'Gawley*.⁷¹ Now their authority has been

⁶⁶ See the example given in *Allen v. Flood* [1898] A.C. 1, 138-139. But the other servant might have an action: above, § 149.

⁶⁷ See above, § 148.

⁶⁸ "Picketing" in a trade dispute is considered in detail above, § 149.

⁶⁹ The whole of the preceding paragraph was cited with approval by Lord Devlin in *Rookes v. Barnard* [1964] A.C. 1129, 1205.

⁷⁰ (1820) Cro.Jac. 587.

⁷¹ (1793) 1 Peake 270.

emphatically affirmed by the House of Lords in *Rookes v. Barnard*.⁷²

The threat in *Rookes v. Barnard* was that strike action on the part of all A.E.S.D. men employed by B.O.A.C. would occur unless the plaintiff was withdrawn from the design department.⁷³ The plaintiff was a non-unionist and the defendants were two employees of B.O.A.C., union members of A.E.S.D., and Silverthorne, the local trade union official, who had not himself got a contract of employment with B.O.A.C.

The threat made by the defendants was a wrongful act, being in breach of the no-strike agreement made between B.O.A.C. and the union, so that there were threats of wrongful acts aimed and directed at the plaintiff's employment with the object and result of causing its termination, for B.O.A.C. were so impressed by the threat that they responded to it by giving Rookes one week's notice of dismissal.

The House of Lords held that these threats constituted the tort of intimidation and that the defendants were not protected by section 8 of the 1906 Act, for the acts of the defendants were not actionable "on the ground only that they interfered with the trade business or employment of the plaintiff," but also on the ground that they constituted the tort of intimidation.

This decision was said to be anomalous, in that the third party would have had no right to sue for an actual breach of contract, but there is nothing anomalous about it for three reasons.

First, the two causes of action are distinct and independent; one is not supplemental to the other. The plaintiff is enforcing his own right, not that of the intimidated third party.

Secondly, the two causes of action are in truth alternative, because that of the third party only arises if the party threatened succumbs to or complies with the threat, which necessarily deprives him of any right of action.

⁷² [1964] A.C. 1129. For the periodical literature on the case, see above, p. 527.

⁷³ See [1964] A.C. 1129, 1182.

Thirdly, the right of action given to the third party is not an infringement of the rule that no third party can acquire a right under a contract, for here the third party acquires the right not under the contract because it has been performed but precisely because it has not been performed in a manner harmful to him.

If the party intimidated does not respond to the threat then the plaintiff cannot sue, for the plain reason that he has not been damaged. This meets the case where the threat is whimsical—for example, the office boy who threatens to leave unless the chairman of the company is removed,⁷⁴ or where the person threatened is brave enough to stand up to it, as was Mr. Stratford in *Stratford & Son, Ltd. v. Lindley*.⁷⁵ But if seventy members of a union threaten to leave even a great public corporation like B.O.A.C. may surrender.

The decision certainly shows the willingness of the courts to treat economic loss in the same way as physical loss and is in general justifiable on the ground that intimidation of any kind is highly objectionable and that there is no reason to limit the unlawful acts which constitute the wrong to those which are criminal or tortious as distinct from those which are breaches of contract.

“ I think it would be old-fashioned and unrealistic for the law to refuse relief in such a case and to grant it where there is a shake of the fist or a threat to publish a nasty and untrue story.”⁷⁶ But Parliament might, in the limited field of industrial disputes, make the dividing line one between physical and economic pressure and not one between lawful and unlawful coercion.⁷⁷ Actionable threats are not limited to cases of trade disputes though doubtless they are its most common illustration. For a lessor who threatened breaches of, say, the covenant for quiet enjoyment in a lease with the object of damaging one of the tenant's friends or relations would be liable.⁷⁸

⁷⁴ *Rookes v. Barnard* [1962] 2 All E.R. 579, 388–389.

⁷⁵ [1965] A.C. 269.

⁷⁶ [1964] A.C. 1129, 1219, *per* Lord Devlin.

⁷⁷ [1964] A.C. 1129, 1220.

⁷⁸ [1964] A.C. 1129, 1187; *Hoffmann*, 81 L.Q.R. 116.

It is uncertain what kinds of acts beside those which are criminal or tortious or threatened breaches of contracts are sufficiently unlawful to be comprehended within the tort of intimidation, nor what justification, if any, might be held a defence.⁷⁹ But it does seem plain that the tort does not include contracts which are void simply as being in restraint of trade at common law, though it may include contracts which are void under statute—for example, the Resale Prices Act, 1964.⁸⁰ It has certainly been assumed in at least one House of Lords case⁸¹ that an actual breach of statutory duty was actionable. The tort may also extend to cover threats of breaches of statutory duty,⁸² or threats of vexatious litigation.⁸³

Rookes v. Barnard caused much alarm in the industrial world, for it seemed to threaten “the right to strike,” as the chief weapon of trade union officials whose men are out on strike in pursuance of a trade dispute is that unless the employers meet their demands they will keep the men out on strike—i.e., threaten to continue to procure the men to continue their breaches of contract. To some extent this fear was allayed when the Court of Appeal in *Stratford & Son, Ltd. v. Lindley*⁸⁴ held that it was not actionable to threaten to procure the breach of contract by another person. The *ratio decidendi* of Lord Denning and Salmon L.J. was that as section 8 of the 1906 Act specifically permitted one person to induce another to break his contract in the pursuance of a trade dispute it could not be actionable to threaten to induce a breach.

In a sentence, as the actual breach of a contract is not protected it is therefore wrongful to threaten to break one's own contract; but as the procurement of a breach is not wrongful it is not actionable to threaten to procure it—at least at the suit of the other party to the contract of employment. The third party damnified by such wrongful pressure may still have a right of action.

⁷⁹ Lord Devlin alone mentioned this in [1964] A.C. 1129, at 1206.

⁸⁰ Street, *Torts*, p. 859.

⁸¹ *Smith v. London Transport Executive* [1951] A.C. 555. Such a breach may be illegal means for conspiracy: *Williams v. Hursey* (1959) 103 C.L.R. 80.

⁸² *Wedderburn*, 27 M.L.R. at 260.

⁸³ *Allen v. Flood* [1898] A.C. 1, 105.

⁸⁴ [1965] A.C. 269.

Trade Disputes Bill, 1965

This Bill, which by May 1965 had passed through the House of Commons, was introduced as a result of criticism of the decision in *Rookes v. Barnard*.

Section 1 (1) provides as follows:

“An act done after the passing of this Act by a person in contemplation or furtherance of a trade dispute (within the meaning of the Trade Disputes Act, 1906) shall not be actionable in tort on the ground only that it consists in his threatening—

- (a) that a contract of employment (whether one to which he is a party or not) will be broken, or
- (b) that he will induce another to break a contract of employment to which that other is a party.”

At present no more can be done than to note the following points:

- (1) The defendant need not be an authorised officer of a trade union.
- (2) Only threats to break contracts of *employment* are protected: other contracts, *e.g.*, of hire, are still subject to the common law.
- (8) Such threats are immune only from suit in tort: an employee who breaks his contract of service is still liable to be sued for breach of contract by his employer.
- (4) It was repeatedly stated by Government spokesmen in the House of Commons that section 1 (1) (a) was intended to reverse the decision in *Rookes v. Barnard*. Unfortunately it is doubtful whether it succeeds in doing so. For the words “shall not be actionable in tort” might well be held to mean “not actionable by the other party to the contract the breach of which is threatened.” In a sentence, the Bill would protect Silverthorne from being sued by BOAC, but would not protect him from being sued by Rookes. There is some authority to support this view (see above, p. 526). But probably the courts will give a wide interpretation to the words, in view of the known intention of Parliament.
- (5) Section 1 (1) (b) is intended to give parliamentary sanction to the decision of the Court of Appeal in *Stratford (J. T.) & Son, Ltd. v. Lindley*. It probably succeeds in doing so.

(ii) *Intimidation by two or more*

This is one form of the tort of conspiracy, with which we shall deal in the next chapter. But it should be noted now that the defendants in conspiracy may be liable although no illegal means have been used: it is sufficient if their purpose is unlawful.

§ 151. Inducement of Breach of Contract ⁸⁷

Intentionally and without lawful justification to induce or procure anyone to break a contract made by him with another is a tort actionable at the suit of that other, if damage has resulted to him.^{87a} The tort had its origin in the action for enticing away the servant of another. We have seen that in *Lumley v. Gye*⁸⁸ it was held that such an action lay even when the contract the breach of which had been procured was not one of service in the strict sense of the term. It was for some time believed that the principle so established was confined to cases where (i) the defendant's action was malicious, and (ii) the contract in question was one to render exclusive personal services for a fixed period.⁸⁹ It is now, however, perfectly well established that the scope of the action is not limited in either of these ways.

(i) *Malice not necessary*

"I think," said Lord Macnaghten,⁹⁰ "the decision [in *Lumley v. Gye*] was right, not on the ground of malicious intention—that was not, I think, the gist of the action,—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law, if there be not sufficient justification for the interference." So it is no excuse for the defendant to say that he acted on a wrong understanding of his own rights, or without malice, or in good faith.⁹¹

⁸⁷ See Sayre, "Inducing Breach of Contract" (1923) 36 Harv.L.Rev. 669; Lauterpacht, "Contracts to break a Contract" (1936) 52 L.Q.R. 494; Payne, "Interference with Contract" [1954] C.L.P. 111; Thompson, "Protection of the Right to Work" (1963) 41 Can.Bar Rev. 167.

^{87a} This sentence was cited with approval by Budd J. in *James McMahon, Ltd. v. Dunne* (1965) I.L.T.R. 45, 49.

⁸⁸ (1853) 2 E. & B. 216.

⁸⁹ *Bowen v. Hall* (1881) 6 Q.B.D. 333.

⁹⁰ *Quinn v. Leatham* [1901] A.C. 495, at 510.

⁹¹ *Pratt v. British Medical Association* [1919] 1 K.B. 244, 265-266.

Although the plaintiff need not establish that the defendant acted maliciously, he must show that the defendant had actual or constructive knowledge of the particular contract the breach of which is alleged to have been procured.⁹² One cannot be liable for inducing or procuring a breach of contract unless one knows that there is a contract to be broken.

(ii) *All contracts protected*

Nor is the principle any longer confined to inducements to break contracts of service. Thus in *Temperton v. Russell*⁹³ certain builders had contracted with the plaintiff to purchase from him their building materials. The defendants, officials of a trade union which wished to bring pressure to bear upon the plaintiff, procured the builders to break these contracts by threatening them with labour trouble if they refused to do so. The Court of Appeal held the defendants liable. The court was also of the opinion that it was actionable to induce persons not to enter into contracts with the plaintiff, but in this it was wrong. "So far from thinking it a small step from the one decision to the other, I think there is a chasm between them."⁹⁴ In short, the principle in *Lumley v. Gye* protects promised advantages and not mere expectancies.⁹⁵ So no action will lie for the inducement of the breach of a contract which is null and void, e.g., a wagering contract,⁹⁶ or of a contract which is determinable at pleasure, for (unless illegal means have been used⁹⁷) in such a case there has been in truth no breach at all.⁹⁸ It has also been said that contracts to marry are not protected,⁹⁹ but it would seem to be better to say that although such contracts are protected against wilful interference there will normally be a lawful justification for the procurement of a breach. It has been said that the breach

⁹² See *Stratford (J. T.) & Son, Ltd. v. Lindley* [1965] A.C. 269.

⁹³ [1898] 1 Q.B. 715.

⁹⁴ *Allen v. Flood* [1898] A.C. 1, at 121, per Lord Herschell. Trade competition, however ruthless, is not in itself wrongful: see above, § 148.

⁹⁵ But one whose customers have been driven away by threats of violence or other illegal acts may have a remedy for intimidation: see above, § 150.

⁹⁶ *Joe Lee Ltd. v. Dalmeny (Lord)* [1927] 1 Ch. 300.

⁹⁷ See Winfield, *Tort*, p. 679.

⁹⁸ *McManus v. Bowes* [1938] 1 K.B. 98, 127. Contrast *De Stempel v. Dunkels* [1938] 1 All E.R. 238.

⁹⁹ *National Phonograph Co. v. Edison-Bell Phonograph Co.* [1908] 1 Ch. 385, 380.

procured must be one which goes to the root of the contract in question,¹ but this has been doubted.²

What is an inducement or procurement?

It is clear that (apart from cases of conspiracy to injure) acts of a third party lawful in themselves do not constitute an actionable interference with contractual rights merely because they bring about a breach of contract, even if they were done with the object and intention of bringing about such a breach.³ Nor does it make any difference that such acts were done out of spite or ill-will. On the other hand, the defendant need not know the precise terms of the contract breached: it is enough if his knowledge is sufficient to entitle the court to say that he has knowingly procured a breach.⁴ Constructive knowledge may suffice.^{4a} The necessary ingredients of an actionable interference with contractual rights will, however, exist in the following cases:

- (1) When a third party, with knowledge of the contract and the intent to procure its breach, directly persuades or procures or induces one of the parties to that contract to break it. This is the most obvious form of actionable interference and is well illustrated by *Lumley v. Gye* itself.
- (2) When a third party, instead of acting on the mind of the contract-breaker, physically detains him or otherwise renders it impossible for him to perform his contract, e.g., by breaking his essential tools or machinery.⁵ These acts must, of course, be done with knowledge of the contract and intent to bring about its breach. On such facts the contract-breaker will himself have an action for assault or intimidation.
- (3) When a third party and the contract-breaker deal together in a manner which the third party knows to be inconsistent with the contract, e.g., when A pays for and takes delivery of a new car from B, knowing that it is offered to him in breach of a covenant against the resale of new cars.⁶

¹ *De Jetley Marks v. Greenwood* (Lord) [1936] 1 All E.R. 863, 872.

² *D. C. Thomson & Co., Ltd. v. Deakin* [1952] Ch. 646, 689-690.

³ *Ibid.*, at p. 693.

⁴ *Stratford (J. T.) & Son, Ltd. v. Lindley* [1965] A.C. 269, 332.

^{4a} *James McMahon, Ltd. v. Dunne* (1965) 99 I.L.T.R. 45.

⁵ *D. C. Thomson, Ltd. v. Deakin* [1952] Ch. 646, 678, 695-696.

⁶ *B.M.T.A. v. Salvadori* [1949] Ch. 556.

(In this case the tort of conspiracy will probably also have been committed.) The contract-breaker may himself be a willing party to the breach: it is the interference with existing contractual relations which is the essence of the tort, not the inducement to break them.⁷ The tort is only committed if the inconsistent dealing is begun, or continued, after the third party has notice of the contract.⁸

- (4) "Again, so far from persuading or inducing or procuring one of the parties to the contract to break it, the third party may commit an actionable interference with the contract, against the will of both and without the knowledge of either, if, with knowledge of the contract, he does an act which, if done by one of the parties to it, would have been a breach. Of this type of interference the case of *G. W. K. Ltd. v. Dunlop Rubber Co. Ltd.*⁹ affords a striking example."¹⁰
- (5) When a third party, with knowledge of the contract and intent to secure its breach, definitely and unequivocally persuades, induces, or procures the servant of one of the parties to break his contract of employment, provided that the breach of the contract forming the alleged subject of interference in fact ensues as a necessary consequence of the breach of the contract of employment.¹¹ It must be clearly shown that the effect of the withdrawal of the services of the particular servant concerned was to render it quite impracticable for the contract-breaker to perform his contract. So "general exhortations issued in the course of a trade dispute, such as 'Stop supplies to X,' 'Refuse to handle X's goods,' 'Treat X as "black,"' and the like"¹² will not usually constitute a sufficient inducement to be actionable (even if the other requisites are present), for the persons moved by such advocacy might well respond in a perfectly lawful way. It must be distinctly shown that unlawful means were advocated

⁷ *Sefton (Earl) v. Tophams, Ltd.* [1964] 1 W.L.R. 1406.

⁸ *De Francesco v. Barnum* (1890) 63 L.T. 514, 515; *D. C. Thomson, Ltd. v. Deakin* [1952] Ch. 646.

⁹ (1926) 42 T.L.R. 376 and 593 (removal of rival's tyres from car at motor show).

¹⁰ *D. C. Thomson Ltd. v. Deakin* [1952] Ch. 646, at 694, per Jenkins L.J.

¹¹ *Ibid.* at 696, per Jenkins L.J. Cf. *Evershed M.R.* at 682.

¹² *D. C. Thomson, Ltd. v. Deakin* [1952] Ch. 646, at 696, per Jenkins L.J.

with the intent of interfering with the performance of a particular contract.

- (6) When a third party, with knowledge of the contract and intent to procure its breach, definitely and unequivocally persuades, induces, or procures one of the customers of the plaintiff to break his contract of sale or hire, or the servant of such a customer to break his contract of service.¹³ If the case is a suitable one for the grant of an interim injunction to preserve the *status quo* until trial, then the defendant may be restrained from interfering with future contracts as well as existing ones, for the plaintiff is entitled to carry on business in the usual way until trial of the action.¹⁴

Advice distinguished from inducement

It will be noticed that the tort is variously described as "procuring" or "inducing" a breach of contract or "interfering with contractual relations." Do these expressions cover mere advice? In the first place it is clear that the advice to be actionable must have been acted upon.¹⁵ It is submitted that on principle mere advice is not actionable: as when a parent advises his daughter to break an engagement of marriage, or a physician advises a patient to break a contract of service for his health's sake. There must be an inducement in the strict sense—that is to say, the intentional creation of some inducing cause or reason for the breach of contract: for example, to induce a servant to leave his employment by an offer of higher wages, or by a threat to inflict some harm upon him, legal or illegal, if he continues in it. To *induce* a breach of contract means to create a reason for breaking it; to *advise* a breach of contract is to point out the reasons which already exist. The former is certainly actionable; the latter is probably innocent.¹⁶

¹³ *Stratford (J. T.) & Son, Ltd. v. Lindley* [1965] A.C. 269.

¹⁴ [1965] A.C. 269, 339.

¹⁵ *Read v. Friendly Society of Stonemasons* [1902] 2 K.B. 732, 737.

¹⁶ The question was discussed *obiter* in *South Wales Miners' Federation v. Glamorgan Coal Co.* [1905] A.C. 239, and in *D. C. Thomson, Ltd. v. Deakin* [1952] Ch. 646. See also *De Stempel v. Dunkels* [1938] 1 All E.R. 238, and *Camden Nominees, Ltd. v. Forsey* [1940] Ch. 352, 366, in which Simonds J. expressed an opinion opposed to that in the text. Cf. the difference between advice and persuasion, above, § 146.

Lawful justification

To induce a breach of contract is not actionable if there is in the circumstances of the case a legal justification for the inducement.¹⁷ What amounts to a justification is a question of law to which, as the authorities stand, no precise answer can be given. It was said by (Sir Robert) Romer L.J. that most attempts to give a complete and satisfactory definition would probably be mischievous and that it must be left to the good sense of the tribunal to analyse the circumstances of the particular case. In so doing "regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and . . . to the object of the person in procuring the breach."¹⁸ Presumably it would be a good justification if, in inducing a breach of contract made by A with the plaintiff, the defendant was doing nothing more than insisting on the performance of another and inconsistent contract previously made between himself and A.¹⁹ But the breach by B of his contract with A cannot properly be held to justify or excuse A in procuring C to break an independent contract with B.²⁰

Moral duty

There are dicta which suggest that where the defendant is acting under the pressure of moral duty he may possibly be justified, as, for example, "where the claims of relationship or guardianship demand an interference amounting to protection,"²¹ as when a father persuades his daughter to break off her engagement to

¹⁷ *South Wales Miners' Federation v. Glamorgan Coal Co.* [1905] A.C. 239; *Quinn v. Leatham* [1901] A.C. 495, 510; *Smithies v. National Association of Operative Plasterers* [1909] 1 K.B. 310.

¹⁸ *Glamorgan Coal Co. v. South Wales Miners' Federation* [1908] 2 K.B. 545, 574-575. This passage was cited with approval by Lord Lindley on appeal, [1905] A.C. 252, by Russell J. in *Brimelow v. Casson* [1924] 1 Ch. 302, 311, and by Slesser L.J. in *British Industrial Plastics Ltd. v. Ferguson* [1938] 4 All E.R. 504, 511.

¹⁹ *Smithies v. National Association of Operative Plasterers* [1909] 1 K.B. 310, 337; *Pratt v. British Medical Association* [1919] 1 K.B. 244, 265.

²⁰ *Smithies v. National Association of Operative Plasterers* [1909] 1 K.B. 310, 341.

²¹ *South Wales Miners' Federation v. Glamorgan Coal Co.* [1905] A.C. 239, at 249 per Lord James of Hereford. Cf. *Camden Nominees v. Forcey* [1940] Ch. 852, 866.

marry a scoundrel.²² It seems clear that it is no sufficient justification that the defendant was acting "as an altruist, seeking only the good of another and careless of his own advantage" ²³ or that he was performing a public service.²⁴ It has been held that it is no justification that an association has a duty cast upon it to protect the interests of its members and has acted in pursuance of that duty ²⁵; but in *Brimelow v. Casson* ²⁶ it was held that the defendants, who were members of the theatrical Joint Protection Committee, were justified in inducing a theatre manager to break his contract with the plaintiff, who paid his chorus-girls such low wages that they were obliged to resort to prostitution. The justifiable object of the defendants was to improve the status of the theatrical profession and to stop the evils which result from under-payment in it.

Inducement by servant

Notwithstanding the general rule, a servant or agent acting on behalf of his employer or principal within the scope of his employment or authority is not liable in tort for inducing or procuring a breach of contract by his employer or principal. For in such a case the servant is not really an intervener or interferer in the contractual relationship but only the *alter ego* of one of the parties to it. If, for example, a company acting by its directors breaks its contract, the only remedy of the other party is to sue the company for breach of contract; he cannot sue the directors for the tort of inducing that breach.²⁷

²² *Crofter Hand Woven Harris Tweed Co. v. Veitch* [1942] A.C. 435, 442-443. But this may perhaps be better explained as an instance of advice as distinct from inducement. Cf. *Findley v. Blaylock*, 1937 S.C. 21. In *Couldrey v. Orrin* (1955), unreported, before Hilbery J., the plaintiff failed in an action against the parents of a girl who had broken off her engagement.

²³ *Read v. Friendly Society of Stonemasons* [1902] 2 K.B. 88, at 97, per Darling J.

²⁴ *Camden Nominees v. Forcey* [1940] Ch. 352, 366.

²⁵ *South Wales Miners' Federation v. Glamorgan Coal Co.* [1905] A.C. 239. [1924] 1 Ch. 302. This decision received the approval of Pollock (40 L.Q.R. 199) and Lord Porter in the *Crofter Co. Case* [1942] A.C. 496. But see Simonds J. in *Camden Nominees v. Forcey* [1940] Ch. at 364, 366.

²⁷ *D. C. Thomson, Ltd. v. Deakin* [1952] Ch. 646, 680-681; *Rutherford v. Poola* [1953] V.L.R. 130. See, however, *de Jetley Marks v. Greenwood (Lord)* [1936] 1 All E.R. 863, 872.

Exception in case of trade disputes

An exception to the rule in *Lumley v. Gye* has been established by section 8 of the Trade Disputes Act, 1906, which is considered above.²⁸

²⁸ See § 149.

CONSPIRACY

§ 152. Conspiracy ¹

It could not till recently be said with any certainty that there was any such tort as conspiracy. Salmond thought ² that there was not and that the cases of conspiracy were in reality only instances of the tort of intimidation. But Lord Dunedin described this as "the leading heresy," ³ though there was much to be said for it on principle and authority. It is now, however, too well established to be the subject of controversy ⁴ that conspiracy is the gist of the wrong in many cases and that it is in the fact of the combination that the unlawfulness resides. In such cases conspiracy is an independent tort.

As a result of the speeches in *Crofter Hand Woven Harris Tweed Co. v. Veitch* ⁵ in 1941 order was introduced and it is now possible to state the law with some confidence.

The confusion which previously prevailed was largely due to the difficulty of explaining and reconciling the speeches in three cases in the House of Lords, *Mogul Steamship Co. v. McGregor, Gow & Co.*,⁶ *Allen v. Flood* ⁷ and *Quinn v. Leathem*.⁸ Though these cases have ceased from troubling it is still desirable for a true understanding of the law to advert to them briefly, accepting the interpretation of the *ratio decidendi* given in the *Crofter Company's* case as canonical.

(1) The Mogul Case

The plaintiff alleged (*inter alia*) that the defendants, who were an associated body of traders in China tea, had wilfully

¹ See Citrine, *Trade Union Law*, Chap. 3; Haslam, *Trade Combinations*, Chaps. ii and iii; Holdsworth, H.E.L. viii, pp. 392-397; Pollock, *Torts*, pp. 287 *et seq.* and Landon's *Excursus*; Report of the Royal Commission on Trade Disputes (1906); Kennedy and Finkelman, *The Right to Trade* (Toronto, 1933).

² See 8th ed., pp. 576-578.

³ *Sorrell v. Smith* [1925] A.C. at 719.

⁴ *Crofter Company's Case* [1942] A.C. 435, 489.

⁵ [1942] A.C. 435.

⁶ [1892] A.C. 25.

⁷ [1898] A.C. 1.

⁸ [1901] A.C. 495.

caused loss to him, a rival trader, by compelling certain merchants in China to cease to act as his agents by means of a threat that if they continued to do so the agency of the defendant association would be withdrawn from them. This was held by the House of Lords to be no cause of action, it being a justifiable measure of self-protection on the part of the association to prevent the same persons from occupying the inconsistent position of agents both for the association and for the plaintiff, since the association had acted with the lawful object of protecting and extending their trade and increasing their profits and had not employed any unlawful means.

(2) *Allen v. Flood*

The defendant, the delegate of an ironworkers' trade union, warned the employers of the plaintiff that unless they discharged him, as they were entitled to do at any time, all the ironworkers would go on strike. The employers thereupon discharged the plaintiff and would not re-engage him. The jury found that the defendant had acted maliciously in inducing the plaintiff's employers to discharge him, but it was held that there was no cause of action. In *Allen v. Flood* the court was dealing with an individual actor; no element of combination entered into it. The case is merely authority for the well-established proposition that, where the element of combination is absent, the motive of the defendant is immaterial, and that damage done intentionally and even malevolently to another gives no cause of action so long as no legal right of the other is infringed.

(3) *Quinn v. Leatham*

Here the facts were very similar but a conspiracy to injure was alleged. The plaintiff was a butcher who had a dispute with the trade union of which the defendants were officials, with respect to the employment of certain workmen who did not belong to the union. The defendants requested the plaintiff to discharge these men, but he refused. Whereupon, with a view to compelling him to do so, the defendants compelled the plaintiff's chief customer to cease to deal with him, by threatening that otherwise they would call out that customer's workmen. The jury found that the defendants had maliciously conspired to

induce the plaintiff's customers not to deal with the plaintiff.⁹ It was held that the plaintiff was entitled to sue the defendants for damages for the loss which he had sustained through the withdrawal of his customer. It is doubtful if a similar decision on these facts would be arrived at today, but a Belfast jury at the end of the nineteenth century could not be expected to appreciate the importance of the "closed shop" in trade union organisation.

(4) *Sorrell v. Smith*¹⁰

In this case, the defendants, members of a committee of circulation managers of London daily papers, threatened to cut off supply to a distributor unless he discontinued supply to a particular newsvendor, the plaintiff. The combination acting as they did for the sole purpose of protecting their trade, had not procured any breach of contract, and were not actuated by spite or any desire to injure the plaintiff. It was held that they had not committed any actionable wrong. "Both moves were episodes in a trade war which was being waged between the retailers of newspapers on the one hand and the producers and wholesalers on the other, and were adopted in the supposed interests of one or the other side. Stroke and counter-stroke, whether wise or not, were equally prompted by a desire to forward or protect trade interests. The plaintiff struck the first blow, and, when it was countered by a similar blow struck by the defendants, ran to the court for protection. His attitude recalls the saying of a French author: 'Cet animal est très méchant; quand on l'attaque, il se défend.' Apparently he forgot that if the defendants were acting illegally then so was he, and that if he was acting illegally a court of equity would hardly be disposed to help him."¹¹ Viscount Cave L.C., in an opinion with which Lord Atkinson concurred, laid down¹² two propositions: "(1) a combination of two or more persons wilfully to injure a man in his trade is an unlawful act and, if it results in damage to him, is actionable.

⁹ The malice was apparently to be found in the fact that the defendants had refused a reasonable compromise. But today it might be realised that from a union point of view it would be harmful to its bargaining power to give the impression that non-members could regain the advantages of membership simply by paying back-dues and fines: Fleming, *Torts*, p. 672.

¹⁰ [1925] A.C. 700.

¹¹ [1925] A.C. 700, at 715, per Viscount Cave L.C.

¹² *Ibid.* at 712.

(2) If the real purpose of the combination is not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues.

The distinction between the two classes of case is sometimes expressed by saying that in cases of the former class there is not, while in cases of the latter class there is, just cause or excuse for the action taken." These propositions were undoubtedly adequate for the decision of the case before the House, and were accepted as correct in the *Crofter Company's* case¹³ but they were not exhaustive,¹⁴ nor were they intended so to be.

(5) The *Crofter Company's* case

Light was thrown on many dark places in *Crofter Hand Woven Harris Tweed Co. v. Veitch*¹⁵ in the House of Lords in 1941. Harris tweed originally was not only woven by hand looms in the island of Lewis by the crofters but was woven out of yarn which had been hand spun in the island. Later the spinning and finishing were done by mills in the island but the yarn was still woven by the crofters. Ninety per cent. of the spinners in those mills, and all the dockers at the island port of Stornoway, were members of the Transport and General Workers' Union, of which the defendants were officials. The union officials were anxious that only members of the union should be employed as weavers by the mill-owners and that the spinners' wages should be increased, but the mill-owners refused to agree to this on the ground that it was impossible in view of the cut-throat competition of the plaintiffs and others who also produced Harris tweed and employed the crofters to weave by hand yarn which they imported from the mainland at a cheaper price than that spun in the island. It was to the interest of the union to have 100 per cent. membership and to the interest of the mill-owners to eliminate competition and for these reasons the defendants bona fide believed their action to be in the general interest of the Harris tweed industry. The defendants instructed the dockers not to handle the plaintiff's yarn or to export the

¹³ [1942] A.C. at 499.

¹⁴ *Ibid.* at 442, 445, 493.

¹⁵ [1942] A.C. 435. For discussions of the sociological bearings of this case see Friedmann, *Law and Social Change*, Chap. 6; Stone, *Province and Function of Law*, Chap. 22.

cloth made from it, and the dockers, without any breach of contract, acted on their instructions. It was held that, even if there was a combination between the defendants and the mill-owners, the plaintiffs had no cause of action since the predominant purpose of the combination was the legitimate promotion of the interests of the persons combining.

§ 153. Combination to Damage in General Actionable

The following propositions are based upon the speeches in the *Crofter* case. A combination wilfully to do an act causing damage to a man in his trade or other interests is unlawful and if damage in fact is caused is actionable as a conspiracy.¹⁶ To this there is an exception where the defendants' real and predominant purpose is to advance their own lawful interests in a matter in which they honestly believe that those interests would directly¹⁷ suffer if the action against the plaintiff was not taken.¹⁸ In truth, the *Crofter* case has made section 1 of the Trade Disputes Act, 1906,¹⁹ largely unnecessary, for there will now be few conspiracies arising out of trade disputes which are not protected at common law.

What amounts to sufficient justification

It had previously been thought by some²⁰ that a combination to damage a man was not actionable unless it was inspired by malice or "disinterested malevolence." The true proposition seems to be that it is actionable unless there is some justification. Such justification will be found if it is inspired by self-interest. The pursuit of selfish ends provides in law, whatever may be the case in morals, its own justification.²¹ Even the fact that the

¹⁶ [1942] A.C. at 446, 451, 464; Lord Porter at 495 apparently doubts this proposition.

¹⁷ i.e., not indirectly as by loss of a large subscription offered to a trade union: *per* Viscount Simon L.C. at 447.

¹⁸ [1942] A.C. at 446, 450, 464, 469. The justification is purely subjective. It seems that if the embargo in the *Crofter Company's* case had been reimposed after the investigation had shown it to be based on an ill-founded view of the defendants' interest it could no longer be justified: *per* Viscount Maugham at 456-457.

¹⁹ For this, see above, § 149.

²⁰ e.g., Lord Sumner in *Sorrell v. Smith* [1925] A.C. 700, 737; Evatt J. in *McKernan v. Fraser* (1931) 46 C.L.R. 343, 398.

²¹ *Crofter Company's Case* [1942] A.C. 450, 469-471, 496. The wrongful intent which must be proved need not necessarily be malevolent: a spirit of revenge for previous real or fancied injury will suffice: [1942] A.C. at 499.

damage inflicted to secure such a legitimate selfish purpose is disproportionately severe, though it may throw doubts on the bona fides of the avowed purpose, does not necessarily involve liability.²² So it seems that, though not inspired by malevolence, a combination would be actionable if its object was to demonstrate the power of those combining to dictate policy or to prove themselves masters in a given situation or if it were inspired by a dislike of the religious views or the politics or the race or the colour²³ of the plaintiff or by mere wantonness.²⁴

It remains to be seen what objects other than self-interest will be recognised as providing a justification. The objects or purposes for which combinations may be formed are clearly of great variety, and it is probably as profitless to attempt to define them as it is to attempt to define the justification for inducing a breach of contract. In determining the existence of a justification regard must be had to the circumstances of each case as it arises.²⁵ Clearly self-interest is not to be interpreted too strictly, and acts done for the protection of trade interests, such as limiting competition, increasing profits or raising wages are within the protection, as are other acts done in the genuine belief that the prosperity of the defendant's industry is jeopardised,²⁶ and it would seem that for this end it may be legitimate to punish a man in order to deter others from similarly offending.²⁷ But apart from such cases we get little guidance, though it has been said by the Court of Appeal²⁸ that the interests which can be lawfully protected are not confined to those which can be exchanged for cash, so that it was permissible for union officials to organise a boycott of a dance-hall which operated a colour-bar.

Mixed motives

Yet motives are often mixed.²⁹ In the case of conspiracy this may be true in two respects. The same individual may be inspired

²² [1942] A.C. at 447, *per* Viscount Simon L.C.

²³ See *Scala Ballroom (Wolverhampton), Ltd. v. Ratcliffe* [1958] 1 W.L.R. 1057.

²⁴ As in *Huntley v. Thornton* [1957] 1 W.L.R. 321 ("ruffled dignity" of trade union leaders).

²⁵ [1942] A.C. at 496.

²⁶ [1942] A.C. at 477.

²⁷ At 475, *per* Lord Wright.

²⁸ *Scala Ballroom (Wolverhampton), Ltd. v. Ratcliffe* [1958] 1 W.L.R. 1057.

²⁹ See Lord Sumner in *Sorrell v. Smith* [1925] A.C. at 739, 742.

by more than one motive, or different parties to the combination may be inspired by different motives. In the former case liability will depend upon ascertaining which is the predominant object or the true motive or the real purpose of the defendant,³⁰ and that must be judged broadly as a jury would judge.³¹ It is less easy to determine how a difference in the object of different parties to the combination affects liability.³² It seems clear that there need not be a complete identity of interest between all the parties. It is sufficient if all the various combining parties have their own legitimate trade or business interests to gain, even though these interests may be of differing kinds,³³ as in the *Crofter Company's* case itself. But it would seem that if the interest of one of the parties is merely separate and mercenary or if one of the parties is actuated merely by hate or vindictive spite that party can have no lawful excuse,³⁴ and if the other knew of and countenanced his purpose by giving assistance to his malicious acts, he also would be a participant in the wrong.³⁵

Unlawful means

Even if the predominant purpose is legitimate it will not provide a defence if unlawful means are used.³⁶ It is doubtful whether it would be lawful for a union to bribe non-members to strike. Some guidance is given by decided cases. In *Ware and De Freville, Ltd. v. Motor Trade Association*³⁷ the Court of Appeal held that the defendant association and its members, being manufacturers of motor-cars, were justified bona fide in trade interests in fixing the retail selling prices, not merely by refusing to deal with recalcitrant traders but by stop-listing such traders and threatening all other persons in the trade who dealt with persons on the stop-list that they would be put on that list themselves. And in *Thorne v. Motor Trade Association*³⁸ the House of Lords held in a similar case that the association were

³⁰ [1942] A.C. at 445, 452, 478.

³¹ At 490, per Lord Porter.

³² See Evatt J. in *McKernan v. Fraser* (1931) 46 C.L.R. 349.

³³ [1942] A.C. at 453, per Viscount Maugham. Cf. Lord Porter at 495.

³⁴ [1942] A.C. at 453, 480.

³⁵ At 495, per Lord Porter.

³⁶ [1942] A.C. at 460.

³⁷ [1921] 8 K.B. 40.

³⁸ [1937] A.C. 797. The actual facts of the stop-list cases are unlikely to recur since the Restrictive Practices Act, 1956, but their principle is unaffected.

entitled to require a member to pay a reasonable fine to the association as an alternative to having his name put on the stop-list, if he sold goods below the list price. But the demand of a sum extortionate in amount would be evidence of an intent to injure as opposed to an intent to protect trade interests.³⁹ It is submitted that when the object of the combination is legitimate the unlawful means which will give a good ground of action against persons acting in concert are the same as the unlawful means which will give a good ground of action against a defendant acting alone.⁴⁰ Hence a conspiracy may be actionable if either the end or the means, or both, are unlawful. But a plaintiff must make up his mind whether he is going to rely on one or other or both of these allegations, and if he has put his case in one of these ways he cannot thereafter bring the same transactions before the court and say that he is relying on a new cause of action.⁴¹

Limits of conspiracy

The *Crofter Company's* case has settled some other points in the law of conspiracy. The action is not limited to trade competition and labour disputes nor is the justification limited to the protection of business interests.⁴² Nor is the tort limited, as Salmond thought,⁴³ to those cases in which the combination is to bring pressure on third persons to cease to deal with or otherwise damnify the plaintiff. If, with the intention of causing damage to A and B, A's servants combine and threaten to leave him unless he ceases to deal with B, and in consequence of this threat he ceases to deal with him, with resulting loss both to himself and to B, both A and B will have a good cause of action.⁴⁴ And it would appear that this is also the case even though the defendants

³⁹ Similarly in order to obtain payment of a gaming debt it is legitimate to threaten to report a defaulter to Tattersalls, an independent committee for the protection of bookmakers: *Burden v. Harris* [1937] 4 All E.R. 559, but a threat to notify a social club or the trade protection societies of the default is a threat to injure and illegitimate: *Norreys v. Zeffert* [1939] 2 All E.R. 187, 190.

⁴⁰ Above, § 150.

⁴¹ *Greenhalgh v. Mallard* [1947] 2 All E.R. 255, 257.

⁴² [1942] A.C. at 446-447, 462, 478, 492.

⁴³ 6th ed., p. 575.

⁴⁴ Cf. Sir William Erle in 1869 in *Memorandum on the Law Relating to Trade Unions*, p. 39. See Ferguson, *Trade Disputes and Trade Unions Act, 1927*, pp. 36-41, and *Reynolds v. Shipping Federation* [1924] 1 Ch. 28, 40.

had no knowledge that their acts were likely to cause damage to A.⁴⁵

Terminology

More precision is desirable here, as it is in the use of phrases like "the right to strike."⁴⁶ The expressions commonly employed in these cases⁴⁷ are "conspiracy to injure" and "intent to injure." But such expressions really beg the question at issue. "Injury" is strictly limited to an actionable wrong, in contrast to "damage," which means loss or harm occurring in fact, whether actionable as an injury or not.⁴⁸ Again in some of the judgments⁴⁹ in these cases there is a confusion between "motive" and "intention." It is better to use the words "purpose" or "object."⁵⁰

Burden of proof

In the *Crofter* case two of the Law Lords said that the burden of proving absence of justification was on the plaintiff,⁵¹ but one said it was on the defendant.⁵² The former view is consistent with the analogy between the crime and the tort of conspiracy (the plaintiff must prove *mens rea*), but the latter is more consistent with the general principle that harm intentionally inflicted is wrongful unless justification is shown, as well as with the general reluctance of the law to require a plaintiff to prove a negative.

§ 154. Basis of the Tort

It is impossible to state what is the reason for this anomalous rule that conduct by two may be actionable if it causes damage, whereas the same conduct by one causing the same damage would give no redress, and that motive is in such cases material.⁵³

⁴⁵ This seems to be implicit in *Sorrell v. Smith*.

⁴⁶ See above, § 148.

⁴⁷ Cf. Lord Wright in *Crofter Company's Case* [1942] A.C. at 468-471.

⁴⁸ [1942] A.C. at 442, per Viscount Simon L.C. Cf. Lord Wright at 469, and Bowen L.J. in the *Mogul Case* (1889) 23 Q.B.D. at 612.

⁴⁹ e.g., in Lord Dunedin's speech in *Sorrell v. Smith* [1925] A.C. at 724.

⁵⁰ *Crofter Company's Case* [1942] A.C. at 444, per Viscount Simon L.C. Cf. Lord Wright at 469.

⁵¹ [1942] A.C. 435, 471 (Lord Wright), 488, 495 (Lord Porter).

⁵² [1942] A.C. at 447-457 (Lord Maugham).

⁵³ When a tort has been committed an allegation of conspiracy adds nothing to the plaintiff's case. Although such an allegation is often put in the statement of claim to widen the scope of a possible order for discovery of documents it should not be encouraged: *Ward v. Lewis* [1955] 1 W.L.R. 9.

To put it in another way, the tort is unusual because it emphasises the purposes of the defendants rather than the results of their conduct. The common law may have taken the view that there is always the danger that any combination may be oppressive, and may have thought that a general rule against injurious combinations was desirable on broad grounds of policy.⁵⁴ But, though there is a very serious difference between the oppressive power of a single workman and that of a trade union having ten thousand members, there is no material difference between the power of one workman and that of two. Moreover, it is clear that a single person may by reason of great wealth or influence be able to exercise coercive power over others in a degree exceeding that which is possible even to a large combination of smaller men.⁵⁵ Why should the combination be liable, while the single individual of even greater wealth and power goes free? ⁵⁶

Another explanation is that the action for conspiracy was derived from the crime of conspiracy developed in the Star Chamber. The essence of conspiracy on which a civil action is founded is a criminal conspiracy, though unless actual damage has followed no civil action will lie. The moment that fact is recognised, the spirit of the criminal law, where motive or intention—the *mens rea*—is everything, is introduced.⁵⁷

⁵⁴ *Crofter Company's Case* [1942] A.C. at 468. Cf. Holdsworth, H.E.L., viii, pp. 396–397.

⁵⁵ *Crofter Company's Case* [1942] A.C. at 443.

⁵⁶ See Lord Sumner in *Sorrell v. Smith* [1925] A.C. at 739–741.

⁵⁷ See Lord Simon L.C. in *Crofter Company's Case* [1942] A.C. at 443–444; Lord Dunedin in *Sorrell v. Smith* [1925] A.C. at 724–726.

FRAUD: DECEIT AND INJURIOUS FALSEHOOD

WRONGS of fraud or misrepresentation are of two kinds essentially distinct—First, the wrong of deceiving the plaintiff so that he causes harm to himself by his own mistaken act, and, secondly, the wrong of deceiving other persons so that they by their mistaken acts caused harm to the plaintiff. The first of these injuries may be called, in a narrow and specific sense of the term, the wrong of Fraud or Deceit; the second has no recognised distinctive title, and in default of a better designation it will here be called the wrong of Injurious Falsehood. We proceed to consider the former of these.

§ 155. Elements of Deceit

The tort of deceit consists in the act of making a wilfully false statement with intent that the plaintiff shall act in reliance on it, and with the result that he does so act and suffers harm in consequence.¹ As we have seen,² the origin of the tort can be clearly traced to the decision of the Court of King's Bench in *Pasley v. Freeman*.³ There are four main elements in this tort⁴: (1) there must be a false representation of fact; (2) the representation must be made with knowledge of its falsity; (3) it must be made with the intention that it should be acted on by the plaintiff, or by a class of persons which includes the plaintiff, in the manner which resulted in damage to him; (4) it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing.

¹ *Bradford Building Society v. Borders* [1941] 2 All E.R. 205, 211.

² Above, § 8.

³ (1789) 8 T.R. 51. "I am old enough to remember when this species of action came into use," said Sir Vicary Gibbs C.J. (b. 1751) in *Ashlin v. White* (1816) Holt 887, at 888, "It was dexterously intended to avoid the Statute of Frauds." Although this particular loophole was stopped by Lord Tenterden's Act, 1828 (see below, § 161), the action of deceit flourished and is now of general application.

⁴ *Bradford Building Society v. Borders* [1941] 2 All E.R. 205, 211.

§ 156. (1) The False Representation of Fact

Here three points are to be noted. First, the false statement may be made either by words or by conduct. Any conduct designed to deceive another by leading him to believe that a certain fact exists is equivalent in law, as in morals, to a statement in words that that fact does exist. Thus it is a fraud to obtain goods on credit in Oxford by wearing without right an undergraduate's cap and gown,⁵ or to take measures for concealing the defects of an article sold.⁶

Secondly, the defendant must have made a positive false statement; a mere passive non-disclosure of the truth, however deceptive in fact, does not amount to deceit in law.⁷ This rule, however, is subject to four qualifications:

(1) The non-disclosure of a part of the truth may make the statement of the residue positively false. It is permissible to tell the whole truth, or to tell none of it, but it is not always possible to tell merely part of it without falling into positive falsehood.⁸

(2) Active concealment of a fact is equivalent to a positive statement that the fact does not exist. By active concealment is meant any act done with intent to prevent a fact from being discovered: for example, to cover over the defects of an article sold with intent that they shall not be discovered by the buyer has the same effect in law as a statement in words that those defects do not exist.⁹

(3) As it is an actionable fraud to leave uncorrected a false statement which is ultimately acted on by the plaintiff to his detriment,¹⁰ it follows that if the defendant makes a statement which he believes to be true and he afterwards discovers that it is false before it has been acted on by the plaintiff, or if he makes a statement which is true when made but becomes false to his

⁵ *R. v. Barnard* (1837) 7 C. & P. 784.

⁶ *Horsfall v. Thomas* (1862) 1 H. & C. 90, 99.

⁷ *Arkwright v. Newbold* (1881) 17 Ch.D. 801, 818; *Bradford Building Society v. Borders* [1941] 2 All E.R. 205.

⁸ *Peek v. Gurney* (1873) L.R. 6 H.L. 377, 392; *Arkwright v. Newbold* (1881) 17 Ch.D. 801, 818.

⁹ *Schneider v. Heath* (1818) 3 Camp. 506 (ship with rotten timbers taken from slipway, and put into water to conceal defects from purchaser); *Horsfall v. Thomas* (1862) 1 H. & C. 90.

¹⁰ *Briess v. Woolley* [1954] A.C. 383.

knowledge before it has been acted on,¹¹ it is his duty to disclose the truth.¹² In such a case a person who is not the maker of the statement may also be liable, either if he is vicariously responsible for the acts of the representor¹³ or if he deliberately and knowingly uses the delusion created by the fraud in the injured party's mind in order to profit by it.¹⁴

(4) In certain cases there is a statutory duty of disclosure, the breach of which is apparently an actionable fraud. For example, there is a statutory duty to disclose certain matters in a company prospectus.¹⁵

Thirdly, the misrepresentation must be a false statement of fact, and not a mere broken promise. If the words of the defendant amount to a mere promise, they cannot be the basis of an action of tort, and impose no liability on him unless they conform to all the requirements of a valid contract. There is no such thing known to the law as a promise which is not good enough for a contract, but the breach of which is actionable as a tort.¹⁶ The term fact, however, is used to include everything except a promise. Thus a statement of opinion, if wilfully false, is actionable as a tort.¹⁷ So an expression of opinion concerning a present or future event may be a representation of fact if it implies that it is an opinion presently held.¹⁸ "It may be that in the first instance the description of an object is a matter of opinion; but, if everyone's opinion about it is agreed, the description achieves sufficient certainty to become a fact."¹⁹ Similarly there seems

¹¹ The tort becomes complete only when the misrepresentation—not having been corrected in the meantime—is acted upon by the misrepresentee: if false when made but true when acted upon there is no misrepresentation: *Briess v. Woolley* [1954] A.C. 333, 353. Although no action will lie until damage has been suffered (which may be after the act induced) the tort is complete in the sense that this is the moment relevant to an inquiry into its falsity: *Wedderburn, Note*, [1954] C.L.J. 177.

¹² *Inclendon v. Watson* (1862) 2 F. & F. 841; *Brownlie v. Campbell* (1889) 5 App.Cas. 925, 950. The question was left open by Lord Porter in *Bradford Building Society v. Borders* [1941] 2 All E.R. 205, 228, but the matter seems settled by *Briess v. Woolley* [1954] A.C. 333.

¹³ *Briess v. Woolley* [1954] A.C. 333.

¹⁴ *Bradford Building Society v. Borders* [1941] 2 All E.R. 205, 208.

¹⁵ Companies Act, 1948, s. 38. See also the Prevention of Fraud (Investments) Act, 1958.

¹⁶ *Jorden v. Money* (1854) 5 H.L.C. 185.

¹⁷ *Anderson v. Pacific Insurance Co.* (1872) L.R. 7 C.P. 65, 69.

¹⁸ *Bisset v. Wilkinson* [1927] A.C. 177, 182; *Ballard v. Gaskill* [1954] 4 D.L.R. 427.

¹⁹ *Armstrong v. Strain* [1951] 1 T.L.R. 856, at 860, per Devlin J.

no real reason to doubt that an action will lie for a fraudulent misrepresentation of law.²⁰ So also an action of tort will lie for a false representation of intention.²¹ An unfulfilled promise to do a thing is actionable as a contract or not at all; a false statement of intention to do a thing may be actionable as a tort. Thus in *Edgington v. Fitzmaurice*,²² the directors of a company were held liable for fraud in borrowing money on behalf of the company on a false statement of the purpose to which the loan was to be applied. "The state of a man's mind," said Bowen L.J., "is as much a fact as the state of his digestion."²³

§ 157. (2) Knowledge of the Statement's Falsity

A false statement is not actionable as a tort unless it is wilfully false. Mere negligence in the making of false statements is not actionable as deceit. This is established by the House of Lords in the leading case of *Derry v. Peek*.²⁴ The facts in *Derry v. Peek* were that the directors of a tramway company which had authority to use steam power with the consent of the Board of Trade, believing that this consent would be given as a matter of course, issued a prospectus in which it was stated that they had the right to use steam power without reference to any condition. In reliance on this statement the plaintiff took shares in the company. The promoters were held not liable in damages, on the ground that there was no proof that the error was fraudulent.

Honest belief essential

When, then, is a statement wilfully false within the meaning of the rule in *Derry v. Peek*? The test is the existence of a genuine belief in the truth of the statement. It is not necessary for

²⁰ *West London Commercial Bank v. Kitson* (1884) 13 Q.B.D. 360; *Eaglesfield v. Londonderry (Marquis of)* (1877) 4 Ch.D. 698.

²¹ But not a criminal prosecution: *R. v. Dent* [1955] 2 Q.B. 590.

²² (1885) 29 Ch.D. 459.

²³ 29 Ch.D. at 483. It is not actionable fraud, however, for a seller or buyer to obtain an advantageous bargain by falsely stating that he is not prepared to take less or give more for the property than a certain sum. In such a case the plaintiff can show no legal damage; he has lost a better bargain, indeed, but he has lost nothing to which he had any legal right: *Vernon v. Keys* (1810) 12 East 692. Criticism: Winfield, *Tort*, p. 552.

²⁴ (1889) 14 App.Cas. 337. Winfield, *Tort*, p. 559, well says of *Derry v. Peek*: "The decision of the House of Lords was good law and good sense. . . . A careless man is not a dishonest man and no amount of argument will prove that he is one. That was all that *Derry v. Peek* decided." See also the discussion of this case by Pollock, 5 L.Q.R. 10; Anson, 6 L.Q.R. 72.

liability that the defendant should have known it to be false; it is sufficient if he did not genuinely and honestly believe it to be true. Every statement is explicitly or implicitly a statement as to the belief of the speaker, and if that belief does not exist the statement is knowingly and wilfully false.²⁵

It is sometimes said that it is sufficient for liability that the statement should be made recklessly. The term recklessly, however, must here be taken to be used to indicate the absence of any genuine belief—the presence of conscious ignorance of the truth of the matter. Recklessness, in the sense of gross negligence, is no ground of liability. No negligence, however gross, amounts to fraud. Although an absence of reasonable grounds for believing a statement to be true is not in itself a ground for liability, it is important evidence that no such belief really exists and therefore that the defendant is guilty not of negligence but of fraud.²⁶

If a statement is ambiguous, it must be taken in the sense in which the defendant himself meant it—that is to say, in the sense in which he intended that it should be understood by the plaintiff. It is immaterial that some other sense is more natural, and that the plaintiff understood the statement in that sense and was deceived by it; for in such a case the defendant is guilty of negligence only, and not of fraud.²⁷

§ 158. (3) Intent that Statement shall be acted on

A false statement is not actionable, whatever damage may result from acting in reliance on it, unless it was made with intent that the plaintiff should act in reliance on it in the manner in which he did act. He who tells lies is not responsible to the whole world for the consequences of them. The only person entitled to rely on a statement and to act accordingly is he who is intended to rely on it and to act upon it by the person making

²⁵ *Smith v. Chadwick* (1884) 9 App.Cas. 187, 203.

²⁶ *Derry v. Peek* (1889) 14 App.Cas. 837, at 375, *per* Lord Herschell. For the protection afforded by legal advice, see *Delany v. Keogh* [1905] 2 I.R. 287, 290; and for the burden of proof to be discharged by the plaintiff, see *Hornal v. Neuberger Products, Ltd.* [1957] 1 Q.B. 247.

²⁷ *Smith v. Chadwick* (1884) 9 App.Cas. 187, 201; *Akerhielm v. De Mare* [1959] A.C. 789. There are, indeed, several dicta to the contrary, but they are prior to *Derry v. Peek* and must now be treated as unsound. See *Williams* in 61 L.Q.R. at 892; *Devlin J. in Armstrong v. Strain* [1951] 1 T.L.R. 856, 871, and the same learned judge in 53 L.Q.R. at 860-861.

it. All others accept it at their own risk, and if they come to harm, must blame their own credulity only. Thus in *Peek v. Gurney*²⁸ it was held that a person who in reliance on a fraudulent prospectus issued by promoters bought shares in the market and so suffered loss had no cause of action against the promoters: for the purpose of a prospectus is to induce persons to apply to the company for shares, not to induce them to buy in the market shares already issued. The plaintiff, therefore, had acted in a manner not intended, and had relied on the false statement for a purpose that was foreign to it. On the other hand, it is not necessary that the false statement should be made with intent that any specific individual should be deceived and act in reliance on it. A representation may be made to the public at large with intent that any member of the public may act on it, and in this case liability will be incurred towards any person so acting.²⁹ Nor need there be any intention to cause loss to the plaintiff; the only necessary intent is that the plaintiff shall be deceived and shall act in a certain way; and if, as the natural and probable result of so acting, any damage is suffered by him, the defendant is responsible for it, whether he meant that damage to ensue or not.³⁰

It is not enough, therefore, that it is the natural and probable consequence of the false statement that the plaintiff will rely and act on it, if this was not the intention of the defendant. It would seem on principle, however, that it is enough if the defendant's apparent intention was that the plaintiff should act on his statement, whatever his real and concealed intention may have been.³¹ If the defendant makes a wilfully false statement, which the plaintiff naturally and reasonably believes to be made to him with intent that he shall act in reliance on it in a certain manner, and he does so act, it would seem right that the defendant should be estopped from alleging that his apparent intention was not his real intention.³²

²⁸ (1873) L.R. 6 H.L. 377. The relevance of *Peek v. Gurney* to current Stock Exchange practice has been doubted: Gower, pp. 316-317.

²⁹ *Andrews v. Mockford* [1896] 1 Q.B. 372.

³⁰ *Edgington v. Fitzmaurice* (1885) 29 Ch.D. 459, 482.

³¹ *Polhill v. Walter* (1832) 3 B. & Ad. 114.

³² (1873) L.R. 9 Q.B. 34.

“ Materiality ”

If the statement is actually relied on, it is no defence that the plaintiff was negligent or foolish in doing so, or that he had a full opportunity of discovering the truth for himself. Every man has in law a right to believe and act on all lies told him by others with intent to deceive him.³³ Nor is it any defence to say that the representation is not “ material,” or would not have induced a reasonable man. The true question is whether the statement was a real inducement to the plaintiff: a representation may be material as between the parties, though not to a normal man.³⁴

§ 159. (4) Damage to the Plaintiff

No action will lie for a false statement unless the plaintiff did in fact rely and act upon it, even if he acted in the way intended by the defendant and suffered harm in consequence.³⁵ A mere attempt to deceive is not actionable.³⁶ It is sufficient, however, that the false statement was one of the reasons which induced the plaintiff to act as he did.³⁷ Nevertheless, if the plaintiff, although he relied on the statement, would have acted as he did, even had the statement not been made, he will have no cause of action.³⁸ In such a case he has suffered no damage by the fraud. In an action for fraudulent misrepresentation on a sale of land or goods the usual measure of damages is the difference between the price paid and the fair market value at the time of the

³³ *Redgrave v. Hurd* (1881) 20 Ch.D. 1; *Pearson v. Dublin Corporation* [1907] A.C. 351. Nor is it any defence that the plaintiff's agent knew of the falsity of the statement, if the plaintiff himself did not: *Wells v. Smith* [1914] 3 K.B. 722.

³⁴ *Nicholas v. Thompson* [1924] V.L.R. 554, 566, 578.

³⁵ *Macleay v. Tait* [1906] A.C. 24.

³⁶ *Horsfall v. Thomas* (1862) 1 H. & C. 90. “It is common knowledge that the well-known case of *Peek v. Derry* very nearly never got beyond the court of first instance, because Sir Henry Peek could not be induced to say that he relied upon the statements in the prospectus. It was only by the most skilful management of counsel that he was ultimately got to say that he took the shares relying on the statements in the prospectus”: *Horwood v. Statesman Publishing Co., Ltd.* (1929) 141 L.T. 54, at 58, per Scrutton L.J.

³⁷ *Edgington v. Fitzmaurice* (1885) 29 Ch.D. 459, 485; *Paul and Vincent Ltd. v. O'Reilly* (1915) 49 I.L.T.R. 89.

³⁸ *Macleay v. Tait* [1906] A.C. 24. The question, however, seems mainly academic: for the wrongdoer has no right to institute a conjectural inquiry as to what would have happened if certain things had been said which were in fact not said, or had been said differently: *Smith v. Kay* (1859) 7 H.L.C. 750, 759.

contract; but in special circumstances other heads of damage may be recovered.³⁹

§ 160. Exceptions to Rule in *Derry v. Peek*

The rule in *Derry v. Peek* is subject to seven exceptions, as well as the major qualification flowing from *Hedley Byrne v. Heller* ^{39a}:

(1) Physical harm

The rule in *Derry v. Peek* does not apply to cases in which physical harm to person or property is caused by dangerous chattels or premises negligently represented to be safe. Liability may or may not exist in these cases, but the question is governed by different considerations from those which relate to false representations in general. A distinct category of the law of torts is applicable.⁴⁰ There is also authority that an action will lie if physical harm results from careless statements made in other circumstances.⁴¹

(2) Contractual duty

When there is a contractual relation between the plaintiff and defendant which involves a contractual duty to use care in the making of statements, the rule in *Derry v. Peek* is excluded.⁴² A person may take on himself by contract a duty which the common law does not impose upon him. It should be noticed, however, that even where there is a contractual duty of careful statement the rule in *Derry v. Peek* is excluded only in favour of the person with whom the contract is made and not in favour of third persons who are injured by negligent statements made in breach of it. Thus in *Dickson v. Reuter's Telegram Co.*⁴³ the defendant company negligently addressed and delivered to the plaintiffs a telegram intended for another person, directing a shipment of barley from Valparaiso to England. The plaintiffs, believing that the message was meant for them, acted in pursuance of it and suffered serious loss. Yet it was held that they had no

³⁹ *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247; *Canavan v. Wright* [1957] N.Z.L.R. 790.

^{39a} [1964] A.C. 465. See above, § 83.

⁴⁰ See above, Chap. 12.

⁴¹ See above, § 83.

⁴² See, for example, *De la Bere v. Pearson Ltd.* [1908] 1 K.B. 280.

⁴³ (1877) 3 C.P.D. 1.

cause of action. The misrepresentation was, indeed, the breach of a contractual duty of care, but the contract was made only with the sender of the telegram, and as between the recipient and the telegraph company it was *res inter alios acta*.⁴⁴

(3) Fiduciary relationship

When there has been a breach of a special duty recognised in equity, whether arising from the fiduciary relationship of the parties or the special circumstances of the case, the defendant will be liable for "constructive fraud," even though he has no fraudulent intention. In such a case no damages can be given for tort, but the plaintiff will be given an indemnity for the loss he has suffered—an equitable remedy.⁴⁵ So in *Nocton v. Ashburton* ⁴⁶ a mortgagee claimed to be indemnified against the loss which he had sustained by having been improperly advised and induced by the defendant, acting as his confidential solicitor, to release a part of a mortgage security, whereby the security had become insufficient. Although the solicitor had not been guilty of fraud the House of Lords held that that did not preclude the plaintiff from obtaining relief on the footing of a breach of duty arising from the fiduciary relationship. A similar relationship exists between a bank and its customers, whether actual or potential.⁴⁷

(4) Warranty of authority

Every person who purports to act as the agent of another is deemed in law to have entered into an implied contract of warranty of authority with any person who contracts or otherwise deals with him in reliance on his authority. If, therefore, the agent misrepresents the existence or extent of his authority, he is liable in damages for any loss thereby suffered by those

⁴⁴ For criticisms of this decision see Pollock, *Torts*, p. 215; Buckland, 51 L.Q.R. 639; Fullagar, "Liability for Representations at Common Law" (1951) 25 Austr.L.J. 278, 286.

⁴⁵ See this stressed by Sealy, "Some Principles of Fiduciary Obligation" [1963] C.L.J. 119, 187-139.

⁴⁶ [1914] A.C. 932. On May 20, 1914, Pollock wrote to Holmes: "Haldane [L.C.] asked me last week to a tobacco talk of *Derry v. Peek* and the possibility of minimising its consequences. The Lords are going to hold that it does not apply to the situation created by a positive fiduciary duty such as a solicitor's, in other words, go as near as they dare to saying it was wrong, as all Lincoln's Inn thought at the time"; Pollock-Holmes *Letters*, Cambridge University Press (1941), Vol. i, p. 215.

⁴⁷ *Woods v. Martins Bank Ltd.* [1959] 1 Q.B. 55, 72.

who have dealt with him; the rule in *Derry v. Peek* being excluded by the existence of a contract implied in law.⁴⁸

(5) Estoppel

The rule as to estoppel by representation is not affected by *Derry v. Peek*, and may in certain cases so operate as to impose liability in damages for a false statement which is not fraudulent. A company, for example, which registers a forged transfer of shares is liable by way of estoppel to a purchaser who buys the shares in reliance on the share certificate so issued; for the company is estopped from denying the truth of that certificate, and therefore the title of the plaintiff.⁴⁹

(6) Statutory duty

In certain cases a duty of giving correct information is imposed by statute. Immediately after the decision in *Derry v. Peek* Parliament passed the Directors' Liability Act, 1890, which gave a right of action for damages to persons who had suffered damage as the result of acting upon incorrect statements negligently inserted in a prospectus issued by the promoters or directors of a company. This statute has now been repealed and its provisions re-enacted in section 48 of the Companies Act, 1948.

(7) Principal's liability for fraud of agent

The judgments of the Court of Appeal in *London County Freehold Properties, Ltd. v. Berkeley Property Co., Ltd.*⁵⁰ suggest that there may be yet another exception to the rule in *Derry v. Peek*. In order to understand the problem it is necessary to see how far a principal is liable for the frauds of his agent. The principal is clearly liable if he expressly authorises an agent to make a statement which the agent believes to be true but which

⁴⁸ *Collen v. Wright* (1857) 8 E. & B. 647; *Starkey v. Bank of England* [1908] A.C. 114. "Seen in retrospect, *Collen v. Wright* looks like a curious island. If it had asserted liability for negligent, as well as fraudulent, misrepresentation of authority, it could hardly have escaped immersion by *Derry v. Peek*. But, because it placed the liability in the particular case on so high a ground, the flood swept past it and it escaped and grew": Mr. Justice Fullagar, "Liability for Representations at Common Law" (1951) 25 Austr.L.J. 278, 288. Wedderburn, "Collateral Contracts" [1959] C.L.J. 58, 68, offers another explanation.

⁴⁹ *Re Bahia and San Francisco Ry.* (1868) L.R. 3 Q.B. 584.

⁵⁰ [1936] 2 All E.R. 1039.

the principal knows to be false,⁵¹ or if he purposely employs an agent who is ignorant of the true facts hoping that he will give false information. He may also be liable if he deliberately stands by and allows his innocent agent to make deceitful statements.⁵² Nor can it be doubted that the principal is liable if the agent knowingly makes a false statement in the course of his employment. This is so even though the false statement reaches the third party who acts on it to his detriment either through the principal himself⁵³ or through the agency of a fellow servant,⁵⁴ and even though either of them honestly believes the statement to be true. For in such a case the false representation is made by the agent just as truly as if it had been sent through the post or by the hand of a messenger.⁵⁵

But what is the position if one agent innocently makes a false representation and the principal (or another agent) knows facts which make the representation false but does not know or have any reason to believe that the agent will make the representation? The language used in the *London County Freehold Properties* case was wide enough to suggest liability even in such a case, but in the following year Atkinson J. said⁵⁶ that the decision had been based on a finding of fraud against the defendant's property manager, Jasper Addis, who had supplied the information which was conveyed to the plaintiff by another agent of the company, one De Rees, who honestly believed it to be true. In 1951 the point came before Devlin J. in *Armstrong v. Strain*.⁵⁷ He found himself unable to adopt the interpretation of

⁵¹ *Ludgater v. Love* (1881) 44 L.T. 694. If the agent also knows it is false, then they are joint tortfeasors.

⁵² *Gordon Hill Trust, Ltd. v. Segall* [1941] 2 All E.R. 379, 390.

⁵³ *Pearson & Son, Ltd. v. Dublin Corporation* [1907] A.C. 351, as explained in *Anglo-Scottish Beet Sugar Corporation, Ltd. v. Spalding U.D.C.* [1937] 2 K.B. 607, 619-621.

⁵⁴ *London County Properties* case, as explained by Atkinson J. in the *Anglo-Scottish Beet Sugar Corporation* case in a judgment described by Singleton L.J. as "a masterly analysis of it, and of the authorities on the subject": *Armstrong v. Strain* [1952] 1 K.B. 232, 243.

⁵⁵ *Pearson v. Dublin Corporation* [1907] A.C. 351, 367.

⁵⁶ *Anglo-Scottish Beet Sugar Corporation Case* [1937] 2 K.B. 607, 624.

⁵⁷ [1951] 1 T.L.R. 856. By a strange coincidence, Sir Patrick Devlin, when a junior at the common law Bar, had written an article ("Fraudulent Representation" (1937) 53 L.Q.R. 344) containing penetrating criticism of the *London County Freehold* case (in which he had been of counsel for the unsuccessful defendants: see 155 L.T. 190 (not in [1936] 2 All E.R. 1099)). Much of the reasoning in this article (to which "I was not unnaturally referred") finds a place in his judgment.

Atkinson J. and preferred to follow the apparently inconsistent decision of the Court of Appeal in *Gordon Hill Trust, Ltd. v. Segall*.⁵⁸ Devlin J. pointed out that ever since *Derry v. Peek* it had been necessary to find actual fraud or dishonesty—conscious knowledge of the falsity of the statement—on the part of the defendant, and it was precisely this finding of conscious knowledge which it was impossible to make in the case of an innocent division of ingredients. “If in such circumstances, the principal is to be held liable, then fraud would be found in many cases of innocent division where it could never be found against a single person. . . . There is no way of combining an innocent principal and agent so as to produce dishonesty . . . you cannot add an innocent state of mind to an innocent state of mind and get as a result a dishonest state of mind.”⁵⁹ But in the Court of Appeal the view of Atkinson J. was preferred, Singleton L.J. saying⁶⁰ that the *London County Freehold* case “should not be treated as an authority except and in so far as the decision was based on the fraud of Addis.” Although the court would thus seem to have denied that there was any inconsistency between its own previous decisions,⁶¹ and so absolved itself from considering in detail the criticisms of the doctrine that the elements of fraud may be collected from the various agents of the defendant, it is clear from the whole tenor of the judgments that that doctrine is no longer supported by any convincing reasoning.⁶²

⁵⁸ [1941] 2 All E.R. 379. “I find it impossible to believe that the Court of Appeal would convict of fraud a man whom the trial judge had acquitted without making it plain that they were doing so”—[1951] 1 T.L.R. at 862. But on appeal Singleton L.J. said that Devlin J. had been misled by “the somewhat nebulous way in which the judgments in the case are expressed”—[1952] 1 K.B. at 243.

⁵⁹ [1951] 1 T.L.R. 856, at 872.

⁶⁰ [1952] 1 K.B. 232, at 244.

⁶¹ “Is a decision of the Court of Appeal that two previous decisions of its own are reconcilable, less or more binding on it, than a decision of the Court of Appeal that two previous decisions of its own are irreconcilable?” This was a question which Asquith L.J. invited the Public Teachers of Law to solve: [1950] 1 J.S.P.T.L. 350, 362.

⁶² See in particular the explanation of the judgment of (Sir Mark) Romer L.J. in the *London County Properties* case given by (Sir Charles) Romer L.J. in *Armstrong v. Strain* [1952] 1 K.B. 232, 248. It is true that there is some authority for the proposition that a master may be liable even though his servant has not committed any actionable tort (below, § 191), and that the decision in *Armstrong v. Strain* may cause serious difficulty to a plaintiff who wishes to hold a corporation responsible for the statements of two or more of its employees. See Gower, 15 M.L.R. 232; *Woyka & Co. v. London & Northern Co.* (1922) 10 Ll.L.Rep. 110; *Howse v. Quinnell*

§ 161. Representations as to Credit

There is one kind of false statement which, by reason of an anomalous rule of statute law, is no ground of action unless made in writing—namely, a representation as to the credit of a third person. This exception is established by the Statute of Frauds Amendment Act, 1828, commonly known as Lord Tenterden's Act, by which it is provided that "no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon [*sic*],"⁶³ unless such representation or assurance be made in writing signed by the party to be charged therewith." The purpose of this enactment was to prevent the evasion of the fourth section of the Statute of Frauds, 1677 (which requires a guarantee to be in writing), by suing on a verbal guarantee in an action of tort instead of contract, and alleging that the defendant had made a false and fraudulent representation as to the credit or financial ability of the debtor.⁶⁴ A writing, therefore has been made essential for the tort as well as for the contract.⁶⁵ The Act applies only to actions of tort based on fraudulent misrepresentation; not to actions for breach of contract or for the breach of some other duty of care in making representations.⁶⁶ The signature of an agent is not sufficient, for the Act requires the personal signature of the defendant himself.⁶⁷ This is so even when the defendant is a body corporate—although in such a case no signature except that of an agent is possible. Thus an incorporated

Motors, Ltd. [1952] 2 D.L.R. 425; *Smith and Youngson (Pet.), Ltd. v. Dubie Bros.*, 1959 (1) R. & N. 351.

⁶³ The word "upon" is nonsensical, and evidently represents some clerical error in the Act. It has been suggested with much probability that the word "credit" has been accidentally transposed, and should follow the word "upon," so that the phrase would read "may obtain money or goods upon credit." An alternative and less plausible suggestion is that "upon" is a mistake for "thereupon." However this may be, the word as it stands is meaningless, and must be disregarded in construing the section: *Lyde v. Barnard* (1836) 1 M. & W. 101.

⁶⁴ See above, § 155.

⁶⁵ *Lyde v. Barnard* (1836) 1 M. & W. 101, 114.

⁶⁶ *Banbury v. Bank of Montreal* [1918] A.C. 626.

⁶⁷ *Swift v. Jewsbury* (1874) L.R. 9 Q.B. 301.

bank is not responsible for a fraudulent representation as to credit made by a manager of one of its branches.⁶⁸

This unfortunately drafted enactment is not to be read literally in accordance with the vague and unrestricted generality of its terms, but is on the contrary to be restrictively construed by reference to the known object of the legislature and the known mischief which it was intended to prevent.⁶⁹ In accordance with this restrictive interpretation the Act applies only to those cases in which the defendant's representations have been made for the purpose of inducing the plaintiff to give credit to the third person.⁷⁰ Where, on the other hand, the plaintiff is induced by the defendant's representations to act in some other way than that of giving credit to a third person, Lord Tenterden's Act is not applicable, even though those representations may fall within the letter of the Act as relating to the character, conduct, ability, trade or dealings of that third person. Thus, if the defendant has induced the plaintiff to buy the goodwill of A's business by fraudulent statements as to the nature, prosperity and prospects of that business, the defendant will plead in vain that those statements were not in writing signed by him. Lord Tenterden's Act is a good defence even though the intent of the defendant in inducing the plaintiff to give credit to the third person was thereby to obtain a pecuniary advantage for himself, as for example the payment of a debt owing to him by that third person. The statute looks to the immediate intent with which the false representation was made, not to the ulterior motive of the person who makes it.⁷¹

§ 162. Injurious Falsehood: Slander of Title and Slander of Goods ⁷²

We proceed now to the consideration of the second form of actionable misrepresentation—namely, that which we have

⁶⁸ *Hirst v. West Riding Union Banking Co., Ltd.* [1901] 2 K.B. 560. In *Barwick v. English Joint Stock Bank* (1867) L.R. 2 Ex. 259, in which a bank was held liable for fraudulent representations made by its manager as to the credit of a third person, the defence of Lord Tenterden's Act was not raised.

⁶⁹ *Banbury v. Bank of Montreal* [1918] A.C. 626, 691.

⁷⁰ *Lyde v. Barnard* (1836) 1 M. & W. 101, 123.

⁷¹ *Clydesdale Bank, Ltd. v. Paton* [1896] A.C. 381.

⁷² See Wood, "Disparagement of Title and Quality" (1942) 20 Can. Bar Rev. 296, 480; Prosser, "Injurious Falsehood: the Basis of Liability" (1959) 59 Col.L.Rev. 425.

termed Injurious Falsehood.⁷³ The wrong of deceit consists, as we have seen, in false statements made to the plaintiff himself whereby he is induced to act to his own loss. The wrong of injurious falsehood, on the other hand, consists in false statements made to other persons concerning the plaintiff whereby he suffers loss through the action of those others. The one consists in misrepresentations made to the plaintiff, the other in misrepresentations made concerning him.

It may be stated as a general rule that it is an actionable wrong maliciously to make a false statement respecting any person or his property with the result that other persons deceived thereby are induced to act in a manner which causes loss to him. "That an action will lie for written or oral falsehoods not actionable *per se* nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce and where they do produce actual damage, is established law."⁷⁴ This wrong of injurious falsehood is to be distinguished not only from the wrong of deceit, but also from that of defamation, to which it is analogous, but from which it is distinct. Both in defamation and in injurious falsehood the defendant is liable because he has made a false and hurtful statement respecting the plaintiff; but in one case the statement is an attack upon his reputation, and in the other it is not. A statement which injures the plaintiff in his reputation is governed by the very stringent rules of libel and slander, but a statement (whether written or verbal) which injures him only by misleading other persons into action that is detrimental to him falls within the more lenient rule of liability which we are now considering. In particular, it should be noted that no action lies for such a statement unless it has been made maliciously: here, as in some other branches of the law of torts, carelessness alone, however gross, does not suffice to establish liability.⁷⁵ Thus one who has his application for employment refused as the result of an inaccurate (but not dishonest) medical report has no remedy against the careless doctor.⁷⁶

⁷³ Salmond's term has been widely accepted, although the draftsman of the Defamation Act, 1952, s. 3, described the tort as Malicious Falsehood.

⁷⁴ *Ratcliffe v. Evans* [1892] 2 Q.B. 524, at 527, *per* Bowen L.J.

⁷⁵ See below, § 163.

⁷⁶ *Chissel v. Chapman* (1954) 56 Ceylon N.L.R. 121. Liability for careless statements made to the plaintiff himself is another matter: above, § 160.

Examples of injurious falsehood

The earliest cases concern oral aspersions on the plaintiff's title to land. Later the law was extended to cover written aspersions and the title to property other than land, and then to cover disparagement of quality as distinct from title.⁷⁷ An example of "slander of title" in the narrow sense occurs when a sale by auction is defeated or prejudiced by an adverse claim made to the property by the defendant, or when the plaintiff's trade is affected by a false charge that the goods offered by him for sale are an infringement of a patent or copyright.⁷⁸ Another example of the wrong of injurious falsehood is a false and malicious depreciation of the quality of the merchandise manufactured and sold by the plaintiff.⁷⁹ No action, however, will lie for any statement, however false or malicious, which is nothing more than a statement by one trader that his goods are better than those of a rival. This is a special exception to the general rule of liability for injurious falsehood—an exception established to prevent traders from using litigation as a means of advertisement.⁸⁰ It is otherwise, however, with a specific allegation of some defect in the plaintiff's goods, even though made by a rival with the view of promoting the sale of his own.⁸¹

But an action for injurious falsehood lies not only in cases of slander of title, slander of goods and passing off (which we shall consider in § 164, below), but in analogous cases where damage has been wilfully done without just cause or excuse. So in *Ratcliffe v. Evans*⁸² the defendant was held liable in damages for having falsely and maliciously published in a newspaper a statement that the plaintiff had ceased to carry on business, in consequence of which statement the plaintiff's trade fell off. So in *Casey v. Arnott*⁸³ an action was brought for the false

⁷⁷ Prosser, 59 Col.L.Rev. 425-426.

⁷⁸ *Malachy v. Soper* (1836) 3 Bing.N.C. 371; *Royal Baking Powder Co. v. Wright, Crossley & Co.* (1901) 18 R.P.C. 95.

⁷⁹ *White v. Mellin* [1895] A.C. 154. Note that words which merely disparage a man's goods without in any way casting reflections on his personal or trading character do not give rise to an action for libel: *Alcott v. Millar's Karri Forests Ltd.* (1905) 91 L.T. 722.

⁸⁰ *White v. Mellin* [1895] A.C. 154.

⁸¹ *Alcott v. Millar's Forests Ltd.* (1905) 91 L.T. 722.

⁸² [1892] 2 Q.B. 524.

⁸³ (1876) 2 C.P.D. 24.

statement that the plaintiff's ship was unseaworthy, in consequence of which statement the crew refused to go to sea in her.

Remedies

It should be remembered that the tort of injurious falsehood is one of those in which the remedies of injunction and declaratory judgment may be more appropriate than an action for damages. In particular, the court has power to make a declaration as to the defendant's title in an action for slander of title or goods, even though such slander has not been proved, when the court thinks it appropriate to state its conclusion upon the title of the plaintiff which the defendant has challenged.⁸⁴

§ 163. Conditions of Liability

"To support such an action it is necessary for the plaintiffs to prove (1) that the statements complained of were untrue; (2) that they were made maliciously—i.e., without just cause or excuse; (3) that the plaintiffs have suffered special damage thereby."⁸⁵

(1) Falsity

The statement must be untrue. This requirement is considered more fully in the next section.

(2) Malice

Lord Davey, in the passage already cited, defined malice as the absence of just cause or excuse. Notwithstanding Lord Davey's dictum, it is now apparently settled that malice in the law of slander of title and other forms of injurious falsehood means some dishonest or otherwise improper motive. A bona fide assertion of title, however, even though mistaken, if made for the protection of one's own interest or for some other proper

⁸⁴ *Reuter (R. J.) Co. Ltd. v. Mulhens* [1954] Ch. 50.

⁸⁵ *Royal Baking Powder Co. v. Wright, Crossley & Co.* (1901) 18 R.P.C. 95. at 99, *per* Lord Davey.

⁸⁶ This paragraph (which has been slightly altered in this edition) was quoted with approval by Maugham J. in *Balden v. Shorter* [1938] Ch. 427, at 430, and by Birkett L.J. in *London Ferro-Concrete Co., Ltd. v. Justics* (1951) 68 R.P.C. 261, 265, and by Harman J. in *Loudon v. Ryder* (No. 2) [1953] Ch. 423, 428.

purpose, is not malicious.⁸⁷ We have already seen that it is not enough for the plaintiff to show that the statement has been made carelessly.⁸⁸

(3) Damage

The common law required the plaintiff to prove special damage as the action was case and not trespass. In 1948 the Porter Committee on the Law of Defamation⁸⁹ said: "The necessity of furnishing proof of special damage has rendered this type of action rare in the extreme: but statements of these kinds may cause very serious damage which, owing to technical rules of evidence, it is impossible to prove strictly as special damage. In the result, the injured person is left without any remedy for the loss which he has suffered." Thus when the plaintiff proved that the *Daily Mail* had published a statement that his house was haunted ("by a little old man creeping about the house") he still failed because he was unable to prove special damage.⁹⁰ This defect has now been remedied by the Defamation Act, 1952. Section 3 provides that it shall not be necessary to allege or prove special damage if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form,⁹¹ or if they are calculated to cause pecuniary damage to the plaintiff in respect

⁸⁷ *Greer's Ltd. v. Pearman & Corder Ltd.* (1922) 39 R.P.C. 406, 417; see also *British Ry. Traffic Co. v. The C.R.C. Co.* [1922] 2 K.B. 260; *Shapiro v. La Morta* (1923) 130 L.T. 622; *Joyce v. Motor Surveys Ltd.* [1948] Ch. 252; *Serville v. Constance* [1954] 1 W.L.R. 487, (1954) 71 R.P.C. 146 (better report). Newark, "Malice in Actions on the Case for Words" (1944) 60 L.Q.R. 366, after a careful examination of the early authorities, comes to the conclusion that the plaintiff need prove no more than that the words were spoken with intent to disparage, and that malice need only be proved if the defendant raises a privilege, e.g., by claiming a title in himself. But Professor Newark does not consider the equity cases and his conclusion is not justified by the language used in modern authorities, which clearly distinguish this tort from defamation.

⁸⁸ Above, § 162.

⁸⁹ Cmd. 7536, para. 51.

⁹⁰ *Barrett v. Associated Newspapers, Ltd.* (1907) 23 T.L.R. 666. By a strange coincidence, the Supreme Court of Canada dealt with a similar allegation the same year: *Manitoba Free Press Co. v. Nagy* (1907) 39 S.C.R. 340.

⁹¹ This includes broadcast statements.

of any office, profession, calling, trade or business held or carried on by him at the time of publication.

§ 164. Injurious Falsehood: Passing off⁹²

To sell merchandise or carry on business under such a name, mark, description, or otherwise in such a manner as to mislead the public into believing that the merchandise or business is that of another person is a wrong actionable at the suit of that other person. This form of injury is commonly, though awkwardly, termed that of *passing off* one's goods or business as the goods or business of another and is the most important example of the wrong of injurious falsehood, though it is so far governed by special rules of its own that it is advisable to treat it separately.⁹³ The gist of the conception of passing off is that the goods are in effect telling a falsehood about themselves, are saying something about themselves which is calculated to mislead.⁹⁴ The law on this matter is designed to protect traders against that form of unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by rival traders. Normally the defendant seeks to acquire this benefit by passing off his goods as and for the goods of the plaintiff in one or more of the modes specified later. But the law governing trade competition is wide enough to prevent a person attaching to his product a name or description with which it has no natural connection in order to make use of the reputation and goodwill gained by a product genuinely indicated by that name and description.⁹⁵

The wrong of passing off is not confined to cases of the sale of goods but assumes many forms, of which the following are the most important:

⁹² Morison, "Unfair Competition and 'Passing-off'" (1956) 2 Sydney L.Rev. 50.

⁹³ Under the Patents Act, 1949, s. 65, it is a tort to cause loss to anyone by making threats of legal proceedings in respect of alleged infringements of patent rights, unless the allegations of infringement are true or the proceedings so threatened are commenced and prosecuted with due diligence. Many of the cases cited above are "threats actions" under the Patents Act.

⁹⁴ *Draper v. Trist* [1939] 3 All E.R. 513, 517-518.

⁹⁵ *J. Bollinger v. Costa Brava Wine Co., Ltd.* [1960] Ch. 262 ("champagne").

(1) A direct statement that the merchandise or business of the defendant is that of the plaintiff

Thus it is an actionable wrong to seek to sell a publication by falsely putting the name of a well-known author on the title-page.⁹⁶

(2) Trading under a name so closely resembling that of the plaintiff as to be mistaken for it by the public

Thus in *Hendriks v. Montagu*⁹⁷ the Universal Life Assurance Society obtained an injunction preventing a company subsequently incorporated from carrying on business under the name of the Universe Life Assurance Association.

(3) Selling goods under a trade name already appropriated for goods of that kind by the plaintiff, or under any name so similar thereto as to be mistaken for it

A trade name means a name under which goods are sold or made by a certain person and which by established usage has become known to the public as indicating that those goods are the goods of that person. A trade name is opposed to a merely descriptive name—namely, one under which goods are sold, but which indicates merely their nature, and not that they are the merchandise of any particular person.⁹⁸ The principle is not confined to purely commercial matters, for “if a man, be he musician, portrait painter or writer of articles in newspapers, gets to be known under a particular name, that name becomes inevitably part of his stock-in-trade, and apart from some special contract or anything of that kind, he is entitled to say that it is his name, and that anyone who adopts or causes the adoption of that name by some other person is inflicting on him an injury.”⁹⁹ But “It is established beyond argument that under the law of England a man is not entitled to exclusive proprietary rights in a fancy name *in vacuo*.”¹ The activities of the defendant must

⁹⁶ *Byron (Lord) v. Johnston* (1816) 2 Mer. 29. But the bare unauthorised use of another's name without more (e.g., that it is a libel) is not actionable: *Tolley v. Fry* [1930] 1 K.B. 467, 478. See below, § 165.

⁹⁷ (1881) 17 Ch.D. 638.

⁹⁸ *British Vacuum Cleaner Co. v. New Vacuum Cleaner Co.* [1907] 2 Ch. 312 (“Vacuum Cleaner”).

⁹⁹ *Hines v. Winnick* [1947] Ch. 708, at 713, *per Vaisey J.*

¹ *McCulloch v. May, Ltd.* [1947] 2 All E.R. 845, at 849, *per Wynn-Parry J.* (The plaintiff, who was well known as “Uncle Mac” of the B.B.C. Children's Hour had no common field of activity with the defendants, who distributed “Uncle Mac's Puffed Wheat.”)

have misled the public into confusing his profession, business or goods with those of the plaintiff. It may be that an actor has a sufficient proprietary interest in his voice to entitle him to complain if the defendant imitates his voice so as to pass off his performance as that of the plaintiff.²

(4) Selling goods with the trade mark of the plaintiff or any deceptive imitation attached thereto

A trade mark is at common law any mark habitually attached by a trader to goods manufactured or sold by him in order to indicate that they are his merchandise, and by established usage known to the public as possessing that significance. Under the Trade Marks Act, 1938,³ no damages can be recovered for the infringement of an unregistered trade mark, but the rights of action for passing off goods as the goods of another person are not affected by the Act. The statute law as to the infringement of registered trade marks does not exclude or supersede this common law protection.

(5) Imitating the get-up or appearance of the plaintiff's goods so as to deceive the public

When there is anything so characteristic in the get-up or appearance of the plaintiff's goods that it identifies those goods as the merchandise of the plaintiff, any deceptive adoption or imitation of that get-up or appearance is subject to the same rules as the deceptive adoption or imitation of his trade name or trade mark.⁴ The tort is also committed when secondhand goods are sold as new.⁵ A tort (perhaps a form of misrepresentation analogous to passing off) is also committed where the defendant knowingly uses unauthorised articles in the performance of some service or process which has acquired a brand or fancy name by reason of the use in it of the plaintiff's branded articles—e.g., a "Jamal hair wave" means not a particular style but a process performed with certain materials.⁶

² *Sim v. J. Heins & Co., Ltd.* [1959] 1 W.L.R. 313.

³ s. 2.

⁴ *Edge (William) & Son, Ltd. v. William Nicolls & Sons, Ltd.* [1911] A.C. 698; *Illustrated Newspapers v. Publicity Services* [1938] Ch. 414. Another example of unfair salesmanship is *Stillitz v. Jones & Higgins, Ltd.* (1943) 60 R.P.C. 15.

⁵ *Morris Motors, Ltd. v. Lilley* [1959] 1 W.L.R. 1184.

⁶ *Sales Affiliates, Ltd. v. Le Jean, Ltd.* [1947] Ch. 295.

Basis of passing-off action

The courts have wavered between two conceptions of a passing-off action—as a remedy for the invasion of a quasi-proprietary right in a trade name or trade mark, and as a remedy, analogous to the action on the case for deceit, for invasion of the personal right not to be injured by fraudulent competition. The true basis of the action is that the passing off injures the right of property in the plaintiff, that right of property being his right to the goodwill of his business.⁷ In general the violation of a right to property is actionable, even though it is innocent and though no damage has been proved. At common law it was necessary to prove an actual fraudulent intention, but a different view was taken in equity,⁸ and since the Judicature Acts it has been generally accepted that it is not necessary in an action for passing off to prove fraud—that is to say, an intent to deceive. Indeed, talk about deceit tends to obscure the essential fact that the plaintiff himself has not been deceived: his complaint is that the defendant has deceived other persons and that that deception is injuring the plaintiff's trade.⁹ It is sufficient in all cases to prove that the practice complained of is calculated (that is to say, likely) to deceive.¹⁰ It is probable, however, that the defendant is not liable if he did not know and could not reasonably have known of the circumstances which rendered confusion likely—*e.g.*, when he does not know of the existence of the plaintiff.¹¹

Actual deception or damage not necessary

The remedies of the plaintiff in an action for passing off are (1) an injunction, and (2) either damages or an account of profits, at the plaintiff's option. The uncertainty as to the conception underlying the action has led to uncertainty as to the requirement of proof of damage. Damage or likelihood of damage to property is the gist of all such actions according to many authorities,¹² but

⁷ *J. Bollinger v. Costa Brava Wine Co., Ltd.* [1960] Ch. 262, 276.

⁸ *Millington v. Fox* (1838) 3 My. & Cr. 338.

⁹ *J. Bollinger v. Costa Brava Wine Co., Ltd.* [1960] Ch. 262, 275.

¹⁰ *Cellular Clothing Co. v. Maxton* [1899] A.C. 326, 334; *Spalding v. A. W. Gamage, Ltd.* (1915) 84 L.J.Ch. 449; *Draper v. Trist* [1939] 3 All E.R. 513, 517.

¹¹ *Morison*, 2 Sydney L.Rev. 50, 55.

¹² *Society of Motor, etc., Traders v. Motor Manufacturers', etc., Insurance Co.* [1925] Ch. 675, 686; *Sturtevant Engineering Co. v. Sturtevant Mill Co.* [1936] 3 All E.R. 187, 145.

the contrary has also been stated.¹³ Probably it is sufficient to prove that the practice complained of is of such a nature that it is likely in the ordinary course of business to deceive the public.¹⁴ Indeed, it seems that the essence of the tort lies in the misrepresentation that the goods in question are those of another; an offer to sell, as distinct from an actual sale, may be enough to constitute an actionable wrong.¹⁵ This is sufficient for an injunction in equity and even for nominal damages at common law. In considering whether deception is probable, account is to be taken, not of the expert purchaser, but of the ordinary ignorant and unwary member of the public.¹⁶ On the other hand, it is not enough that a thoughtless person may unwarrantably jump to a false conclusion. In cases of fraud the onus of proving likelihood of damage is not heavy; the court will readily assume that the defendant will succeed in accomplishing that which he has set himself to accomplish; but where there is no fraud the onus is a very heavy one.¹⁷ Indeed, it may be that nothing more than nominal damages, if even those, can be given for an innocent passing off.¹⁸ In one respect it seems agreed that the protection given by the action differs from the protection given to a full right of property. No damages or account of profits will be granted in respect of innocent user before actual notice of the plaintiff's right. In this respect the right of a trader to be protected against deceptive competition is not like a right of property, an infringement of which, however innocent, will give rise to an action for damages.

§ 165. Confusion through Use of Similar Names

A name originally merely descriptive, and therefore *publici juris*, may by exclusive use in connection with the plaintiff's goods acquire a secondary sense as the trade name of those goods, and

¹³ *Draper v. Trist* [1939] 3 All E.R. 513, 518.

¹⁴ *Reddaway v. Benthams Hemp Spinning Co.* [1892] 2 Q.B. 639, 644.

¹⁵ *Spalding & Bros. v. A. W. Gamage, Ltd.* (1915) 32 R.P.C. 273; (1918) 35 R.P.C. 101.

¹⁶ *Singer Manufacturing Co. v. Loog* (1882) 8 App.Cas. 15, 18.

¹⁷ *Society of Motor Manufacturers and Traders v. Motor Manufacturers', etc., Insurance Co.* [1925] Ch. 675, 686, 689.

¹⁸ *Draper v. Trist* [1939] 3 All E.R. 513, 518, 525, 528. This case seems to show that it is unnecessary to prove that immediate purchasers were likely to be deceived: a manufacturer must not put into the hands of his customers what may deceive others.

will then become subject to the ordinary rule as to trade names; so that the use of it by other persons ceases to be *publici juris*, and is actionable unless they take sufficient precautions to prevent deception. So in *Reddaway v. Banham*¹⁹ it was found by a jury that the term "camel-hair belting" had by long and exclusive association with the plaintiffs' manufacture come to mean, not merely belting made from camel hair, but belting made by the plaintiffs. "The whole merit of that description, its one virtue for Banham's purposes, lies in its duplicity. It means two things. At Banham's works, where it cannot mean Reddaway's belting, it may be construed to mean belting made of camel's hair; abroad, to the German manufacturer, to the Bombay mill-owner, to the up-country native, it must mean Reddaway's belting; it can mean nothing else. I venture to think that a statement which is not literally true, but which is intended to convey a false impression, has something of a faulty ring about it; it is not sterling coin; it has no right to the genuine stamp and impress of truth."²⁰ Hence it was held that the term could not be used by other persons, unless they took adequate precautions against deceiving the public by means of it. The burden, however, of proving this secondary sense is not a light one. The courts will not be easily persuaded to sanction such appropriation of words which belong to the common stock of our language. But even in these cases it seems, though suggestions have been made to the contrary,²¹ that fraud is not essential any more than in the case of a name which is primarily a trade name and not descriptive at all. A name which is originally a trade name may through general use cease to indicate specifically the merchandise of any particular person and may so become merely descriptive and *publici juris*. Thus Liebig's Extract of Meat no longer means a material prepared by Liebig or his assigns,²² nor does Harvey's Sauce mean a sauce sold by the original maker of the article so called.²³ In such a case the onus is reversed: it is for the defendant to show that the word-mark has entirely lost its original meaning and that no purchaser can be deceived by its use.²⁴

¹⁹ [1896] A.C. 199.

²⁰ [1896] A.C. at 218-219, *per* Lord Macnaghten.

²¹ *Cellular Clothing Co. v. Maxton* [1899] A.C. 326, 339.

²² *Liebig's Extract of Meat Co. v. Hanbury* (1867) 17 L.T.(N.S.) 298.

²³ *Lazenby v. White* (1871) 41 L.J.Ch. 354n.

²⁴ *Havana Cigar and Tobacco Factories, Ltd. v. Oddenino* [1924] 1 Ch. 179.

Own names

The application of the rule as to passing off to cases in which the instrument of deception is the use by the defendant of his own personal name is obscure. It would appear, however, that subject to certain qualifications an individual is entitled to trade under his own name regardless of the fact that his business may be thereby confused with a business of some other person bearing the same or a similar name. He is not bound to take any special precautions to avoid or minimise such confusion.²⁵ If there are two grocers named John Brown, each of them is equally entitled to trade under that name, and there is no priority of right in him who first established his business. Nor does it make any difference in such a case that a trader using his own name is well aware of the fact that his business will be confused with that of a rival trader, and intends to take the advantage which such confusion will confer upon him.²⁶ "There is a great deal to be said in favour of a man who engages in any pursuit using therein his own name. If the accomplished but rather disreputable Lord Chancellor of King James was the author of the tragedy of *Hamlet*, as some misguided people think, he would have saved the world much discussion if he had published it under the name of Bacon, or St. Albans, or Verulam, instead of allowing it to appear in the name of one of the best-known men in London of the time."²⁷ It is different if he intends to deceive and not merely to confuse.²⁸

A surname is not a man's legal property, and if a man is called by some other than his real name he may acquire his second name by reputation.²⁹ In such a case also he will not be restrained from using it honestly. So in *Jay's, Ltd. v. Jacobi*³⁰

²⁵ *Contra* Bramwell L.J. in *Massam v. Thorley's Cattle Food Co.* (1880) 14 Ch.D. 748, 761.

²⁶ *John Brinsmead & Sons, Ltd. v. Brinsmead* (1918) 20 T.L.R. 237, 706; *Burgess v. Burgess* (1853) 3 De G.M. & G. 896 (on which Lord Macnaghten once remarked that "The judgment of Turner L.J. though eclipsed in public favour by the brilliancy and point of his colleague's language is an accurate and masterly summary of the law": *Reddaway v. Banham* [1896] A.C. 199, 220).

²⁷ *Dickson v. Dickson* [1909] 1 I.R. 185, at 202, *per* Holmes L.J.

²⁸ *Parker-Knoll Ltd. v. Knoll International, Ltd.* [1962] R.P.C. 265.

²⁹ *Massam v. Thorley's Cattle Food Co.* (1880) 14 Ch.D. 748, 760. No specific formality seems to be required to change one's surname, but a Christian name may (apart from statute) be changed only at confirmation and, possibly, on adoption: *Re Parrott* [1946] Ch. 183. *Cf. Re Lewis's Will Trusts* [1951] 2 T.L.R. 591.

³⁰ [1933] Ch. 411.

the defendant, who was manageress of a ladies' outfitters' shop, had been known to everyone for fifteen years as Miss Jay, and it was held that she had acquired that name by reputation and was entitled to trade under it so long as she acted honestly, even though the similarity of the name to that of the plaintiffs might occasionally lead to the goods of the one being mistaken for those of the other. But a man is not entitled to use his own name dishonestly in order that his goods may be passed off as and for the goods of another.³¹ But in order to deprive him of the right there must be evidence of dishonesty outside the mere use of the name, for example, a resemblance in the manner of the display of the name, or the concealment of that part of the name which differs from the plaintiff's by the use of smaller characters.³² Again, if a defendant pleads that, although deception of the public is proved, the instrument of such deception is nothing more than the lawful exercise by him of his right to use his own name, he must show that the deception complained of is due exclusively to the use of his own name *simpliciter*, and that it is not due to the fact that he has abbreviated his name, or altered it, or added something to it, or used it in some special manner producing confusion not normally or necessarily incident to the mere exercise of his right to trade under his own name.³³ Although an individual trader is entitled to trade under his own name, even though he thereby gets the benefit of the reputation of a rival trader of the same name, an incorporated company has not the same right to use the names of its shareholders. By the Companies Act, 1948, s. 17, a company is prevented from being registered with a name which in the opinion of the Board of Trade is undesirable. Independently of this statutory provision, a company must select a name which is not calculated to deceive, and it is no excuse for choosing a deceptive name that a shareholder to whom that name belongs might lawfully use it in his own business.³⁴ The rule as to passing off is not to be extended to cases in which there is no appropriation by one man of the trade reputation or custom of another, but merely some other form of loss or inconvenience caused by the deception of the public. In the absence of actual

³¹ *Sykes v. Sykes* (1824) 3 B. & C. 341; *Croft v. Day* (1843) 7 Beav. 84.

³² *Brinsmead's Case*, 29 T.L.R. 237, 238.

³³ *Shorts Ltd. v. Short* (1914) 31 R.P.C. 294.

³⁴ *Tussaud v. Tussaud* (1890) 44 Ch.D. 678.

fraud no action will lie in such a case. Thus, in *Day v. Brownrigg*³⁵ the plaintiff and defendant occupied adjoining villas, and the defendant changed the name of his residence, and gave it the same name as that of the plaintiff. An injunction to prevent this was refused, although it was proved that inconvenience would result to the plaintiff through the confusion thus caused. Had the parties been rival traders the result might have been different.

§ 166. Injuries to Immaterial Property: Trade Names

The forms of immaterial property known to our law are patents, copyright, registered trade marks, and the various franchises which may be vested in private persons, such as markets and ferries. A violation of any of these rights of property is an actionable tort. The law as to these matters is, however, too special in its nature to call for examination here. It belongs rather to the domain of the law of property. It is advisable, however, to point out here the true relation of the law as to trade marks to the common law of passing off.

The law as to trade marks is now contained in the consolidating Trade Marks Act, 1938.³⁶ A trade mark validly registered under the Act of 1938 becomes thereby a species of incorporeal property analogous to a patent or copyright, and conferring upon the proprietor an exclusive right to the use of it in respect of the classes of goods in relation to which it is registered (s. 4 (1)). The use of it or of any deceptive imitation of it by any other person is *per se* an actionable infringement of the statutory monopoly so created. Marks registered in Part A of the register are protected to a greater degree than those registered in Part B. Several differences between the protection given by common law and by statute may be mentioned. First, the common law recognises no monopoly or right of property in the use of any name, mark or other trade description. The cause of action in a common law action for passing off is not the infringement of any monopoly or right of property vested in the plaintiff but damage done to the plaintiff in his business by the deceptive

³⁵ (1878) 10 Ch.D. 294. Cf. *Street v. Union Bank of Spain* (1885) 30 Ch.D. 156; *McCulloch v. May, Ltd.* [1947] 2 All E.R. 845.

³⁶ See Kerly, *Trade Marks*; Blanco White, *Trade Marks and Unfair Competition*; Goodeve, *Personal Property*, Chap. XI.

mode in which the defendant carries on his own. In other words, at common law the use of the plaintiff's trade mark is never in itself any cause of action, but is merely one of several means by which the wrong of deceiving the public to the plaintiff's prejudice may be committed. Secondly, passing off can occur in cases which have nothing to do with trade marks, *e.g.*, imitating the get-up or appearance of the plaintiff's goods. Thirdly, the law relating to passing off will protect established lines of goods or businesses from imitation, but will not protect a new business while goodwill is being built up. It is otherwise with the protection given by the Trade Marks Act. Fourthly, an action for infringement of a trade mark may be simpler and less costly than an action for passing off. In particular it avoids the difficulty (often great in practice) of proving that the defendant's mode of conducting business is bound to cause confusion.

WRONGFUL PROCESS OF LAW

IN the case of legal proceedings which are erroneous, malicious, or otherwise wrongful it is necessary to consider the liability of the judges, magistrates, or other judicial officers, and the liability of the parties. We must also distinguish between the liability of the superior courts, *e.g.*, the Supreme Court of Judicature, with unlimited jurisdiction, and that of inferior courts with limited jurisdiction, and again between that of courts of record and that of courts not of record. Courts of record include the Supreme Court as well as various inferior courts. The essential feature of such courts is that their proceedings can be proved only by their own official record, and that their judges possess the power to punish for contempt of court.

§ 167. Liability of the Officers of Superior Courts

A judge of one of the superior courts is absolutely exempt from all civil liability for acts done by him in the execution of his judicial functions.¹ His exemption from civil liability² is absolute, extending not merely to errors of law and fact, but to the malicious, corrupt, or oppressive exercise of his judicial powers.³ For it is better that occasional injustice should be done and remain unredressed under the cover of this immunity than that the independence of the judicature and the strength of the administration of justice should be weakened by the liability of judges to unfounded and vexatious charges of error, malice, or incompetence brought against them by disappointed litigants. The remedy for judicial errors is some form of appeal to a higher

¹ Immunity from actions for defamation has already been considered: above, § 62. In this section we consider actions of trespass for invasions of personal or proprietary interests as the result of an unauthorised or erroneous decision. The history of the topic is in Holdsworth, "Immunity for Judicial Acts" (1924) 1 J.S.P.T.L. 17; H.E.L., vi, pp. 234-240.

² It will be recalled that the Habeas Corpus Act, 1679, provides that a High Court judge who unlawfully refuses to issue a writ of habeas corpus during the vacation is liable to pay a penalty of £500 to the person detained.

³ *Anderson v. Gorrie* [1895] 1 Q.B. 668; *Tughan v. Craig* [1918] 1 I.R. 245.

court, and the remedy for judicial oppression or corruption is a criminal prosecution or the removal of the offending judge; but in neither case can he be called on to defend his judgment in an action for damages brought against him by an injured litigant. Nor is the Crown vicariously liable for his acts.⁴

Acts beyond jurisdiction \

When, however, the illegal act complained of is beyond the limits of the defendant's jurisdiction, it is not definitely settled whether a superior judge is free from liability; or whether, as in the case of inferior judges, he is civilly responsible for such an excess of jurisdiction. This much is clear: in order to establish exemption as regards proceedings in an inferior court the judge must prove that he had jurisdiction,⁵ whereas the plaintiff must prove want of jurisdiction in the case of proceedings in a superior court.⁶ Probably, however, the exemption is absolute even in this case. An appellate court may reverse his decision but there is no court of first instance which has any authority to entertain an action against him and give judgment against him for damages merely because its opinion on the point decided differs from his. So in *Taafe v. Downes*⁷ an action was brought in the Irish Court of Common Pleas against the Chief Justice of the Irish Court of King's Bench for issuing a warrant ordering the arrest of the plaintiff, but a majority of the court held that no such action lay against a judge of one of the superior courts. This is justifiable not merely on grounds of public policy but also as a deduction from the principle that a superior court always has power to determine the limits of its own jurisdiction: it follows that an erroneous conclusion as to the ambit of its jurisdiction is merely an abuse of its jurisdiction and not an act outside its jurisdiction. Protection is also extended to the acts of one whose appointment as a judge is in fact a nullity: the principle appears to be that the acts of a person holding the office of judge

⁴ Below, § 172.

⁵ *Carratt v. Morley* (1841) 1 Q.B. 18.

⁶ *Peacock v. Bell* (1667) 1 Saund. 73.

⁷ (1812) 3 Moore P.C. 36 n. See also *Anderson v. Gorrie* [1895] 1 Q.B. 668; *Tughan v. Craig* [1918] 1 I.R. 245; *New Zealand Waterside Workers' Federation v. Frazer* [1924] N.Z.L.R. 689, 706-707 (judgment of Sir John Salmond); Cooke, "*Venire de Novo*" (1955) 71 L.Q.R. 100, 117; Winfield, *Present Law*, p. 211.

de facto and with colour of right are unimpeachable in any way.⁸ But it is well settled that the protection accorded to judicial acts is not extended to ministerial acts of a judicial officer.⁹

§ 168. Liability of Officers of Inferior Courts

(1) Inferior courts of record

Judges of an inferior court of record possess the same immunity as judges of the superior courts so long as they do not exceed their jurisdiction.

(2) Inferior courts not of record

Probably a similar immunity is possessed even by those inferior courts which are not courts of record.¹⁰ There are many dicta, however, to the effect that justices of the peace (and therefore, presumably, other judicial officers whose courts are not of record) are liable for the malicious exercise of their judicial powers even within the limits of their jurisdiction.¹¹ Section 1 of the Justices' Protection Act, 1848, seems to assume that this is the law; for it provides that any action against a justice of the peace for an act done within the limits of his jurisdiction shall be an action on the case as for a tort, and that it shall be necessary to prove malice and the absence of reasonable and probable cause. There is, however, no case in which any such action has been maintained, and it would seem difficult to justify any such distinction between different classes of magistrates. The trend of recent opinion seems to be against any such distinction.¹²

Liability for excess of jurisdiction

A judge of an inferior court is civilly liable for any act done by him in excess of his jurisdiction and in the nature of a trespass against the person or property of the plaintiff or otherwise a cause of damage to him.¹³ Such a judge determines the limits

⁸ *Re Aldridge* [1893] 15 N.Z.L.R. 361.

⁹ *Ferguson v. Kinnoull (Earl of)* (1842) 9 Cl. & F. 311, 312.

¹⁰ *Haggard v. Pelicier Frères* [1892] A.C. 61.

¹¹ *Cave v. Mountain* (1840) 1 M. & G. 257, 263; *Linford v. Fitzroy* (1849) 13 Q.B. 240, 247; *Taylor v. Nesfield* (1854) 3 El. & Bl. 724, 730.

¹² See Winfield, *Present Law*, pp. 216-219; Sheridan, "Protection of Justices" (1951) 14 M.L.R. 267; Thompson, "Judicial Immunity and the Protection of Justices" (1958) 21 M.L.R. 517.

¹³ This sentence was cited with approval by Denning L.J. in his dissenting judgment in *Abbott v. Sullivan* [1952] 1 K.B. 189, 202. The majority of

of his own jurisdiction at his own peril, and (speaking generally) he will answer for any mistake; nor is it necessary for the plaintiff to prove any malice or want of reasonable or probable cause. The decision of an inferior judge that he possesses jurisdiction is not conclusive in his own favour; it does not lie within his jurisdiction to determine authoritatively the limits of it. His duty is to observe those limits, not to exercise the judicial function of deciding what they are. A superior court, on the other hand, is entrusted with the power of determining its own jurisdiction, and is no more answerable for a judicial error on this point than for a judicial error on any other.¹⁴ It should be noted that it is not the mere making of the order in excess of or without jurisdiction which gives rise to the cause of action in trespass, but the acts done against the plaintiff in consequence of that order, *e.g.*, his committal to prison or the levying of a distress against his goods.¹⁵ One who is aggrieved by an invalid order is not permitted to have the option either of appealing it or of obeying it and then suing the judge for damages.¹⁶ Justices and their clerks who have acted reasonably may be indemnified out of local funds.¹⁷

The distinction thus drawn between an excess of jurisdiction and a wrongful act within the limits of jurisdiction is one which it is easier to state in general terms than to define with accuracy or apply with precision.¹⁸ It may probably be said, however, that a judge may exceed his jurisdiction in three ways:

- (i) When he has no power to deal with the kind of matter brought before him: as when a county court judge tries

the court held that no action in tort lay against a domestic tribunal which had acted *ultra vires* but without malice in expelling the plaintiff from a voluntary association. The position may be different if the tribunal is a statutory one. Today domestic tribunals wield great powers over the members of trades or professions, but it is difficult to say how far they will be controlled by the ordinary courts: see Lloyd, "The Disciplinary Powers of Professional Bodies" (1950) 13 M.L.R. 281; Morris, "The Courts and Domestic Tribunals" (1953) 69 L.Q.R. 318; *Bonsor v. Musicians' Union* [1956] A.C. 104.

¹⁴ *Wilkinson v. Barking Corporation* [1948] 1 K.B. 721, 725.

¹⁵ *O'Connor v. Isaacs* [1956] 2 Q.B. 288 (which also see on whether the conviction or order must be set aside before proceedings are instituted).

¹⁶ *Ibid.* at 302, *per* Romer L.J.

¹⁷ Administration of Justice Act, 1964, ss. 27-28.

¹⁸ See on the whole of this topic the exhaustive articles by Gordon: "The Relation of Facts to Jurisdiction" (1929) 45 L.Q.R. 459; "The Observance of Law as a Condition of Jurisdiction" (1931) 47 L.Q.R. 386, 557; "*Tithe Redemption Commissioner v. Gwynne*" (1944) 60 L.Q.R. 250.

an action of libel other than an action remitted to him by the High Court or an action in which jurisdiction has been given by consent.

- (ii) When he has no power to deal with the particular person concerned: for example, because that person has not been properly summoned before him, or is not resident within the local jurisdiction of the court.
- (iii) When, although there is jurisdiction over the matter and the person, the judgment or order given or made in the matter is of a kind which he has no power to give or make: as if he imprisons instead of fining, or imprisons for a longer period than the law permits.¹⁹

In all these cases the judge is liable as for an excess of jurisdiction. When, on the other hand, he has power to give the kind of judgment which he has given, against the person complaining of it, he is not liable merely because his judgment is erroneous in law or in fact, or because there has been some irregularity of procedure. Such an error or irregularity is merely a wrongful exercise of jurisdiction, not an excess of it. Thus in *Cave v. Mountain*²⁰ justices of the peace were held not liable for imprisoning the plaintiff on insufficient and legally inadmissible evidence, for a decision upon the evidence is within the jurisdiction of the magistrates who have jurisdiction to hear the case.

When a judge exceeds his jurisdiction by reason of a mistake of law, his liability is absolute, being independent of any malice or negligence. He is bound at his peril to know the law as to his own powers.²¹ When, on the other hand, his mistake is one of fact, he is not liable unless he either knew or ought to have known the facts which deprived him of jurisdiction. There must, in other words, be either knowledge²² of the want of jurisdiction or an absence of any reasonable and probable cause for believing that jurisdiction existed.²³ Thus if a judge imprisons a person who by reason of his residence outside the district of the

¹⁹ *O'Connor v. Isaacs* [1956] 2 Q.B. 288.

²⁰ (1840) 1 M. & G. 257.

²¹ *Houlden v. Smith* (1850) 14 Q.B. 841.

²² This means knowledge which a judge has obtained in a judicial capacity:

Palmer v. Crone [1927] 1 K.B. 804, 810.

²³ *Palmer v. Crone* [1927] 1 K.B. 804; *Abbott v. Sullivan* [1952] 1 K.B. 189, 217.

court is not subject to his jurisdiction, he is liable if the mistake is one of law, but not liable if it is an excusable mistake of fact.²⁴

§ 169. Liability of Parties

Having considered the liability of magistrates and judges in the case of wrongful legal proceedings, it remains to deal with the liabilities of the parties to these proceedings. This matter must be considered under three heads—(1) proceedings instituted maliciously; (2) proceedings instituted erroneously and irregularly; and (8) proceedings maintained by parties with no interest. The courts have to hold the balance between the public interest in seeing that criminals are brought to justice and the interest of the individual in freedom from unjustifiable litigation.

§ 170. Proceedings Instituted Maliciously²⁵

It is an actionable wrong to institute certain kinds of legal proceedings against another person maliciously and without reasonable and probable cause. The tort clearly has some affinities with defamation and false imprisonment, but there are also differences. It differs from defamation not only in having an earlier and distinct historical origin but also in affording protection to the plaintiff's interest in the security of his person and property as well as his reputation. It differs from false imprisonment, as we have seen,²⁶ in that the acts of a court of justice cannot be imputed to the litigant at whose suit they have been done: the litigant can be charged only with having maliciously and without reasonable cause exercised his right of setting a court of justice in motion. The tort is commonly called malicious prosecution, but the word "prosecution" has a wider meaning than in the criminal law, and, conversely, not all proceedings which are technically prosecutions are capable of founding an action for malicious prosecution.²⁷ The chief classes of proceedings to which this rule applies are the following:

²⁴ *Houlden v. Smith* (1850) 14 Q.B. 841.

²⁵ For the history of this action, which is derived from the old action upon the case in the nature of conspiracy, see Winfield, *History of Conspiracy*, pp. 118-180; Holdsworth, H.E.L., viii, pp. 385-391; Winfield, *Present Law*, pp. 174-204; Harper, "Malicious Prosecution, False Imprisonment, and Defamation" (1937) 15 Tex.L.Rev. 157; Fridman, "Compensation of the Innocent" (1963) 26 M.L.R. 481.

²⁶ Above, § 50.

²⁷ See below, p. 586.

(1) Malicious criminal prosecutions

It is the wrong known as malicious prosecution to institute criminal proceedings against anyone if the prosecution is inspired by malice and is destitute of any reasonable cause. As it is an action on the case damage must be proved. Unfortunately there is doubt about the definition of damage. As far back as 1701 Sir John Holt C.J. said²⁸ that there were three sorts of damage which would maintain the action: (1) "The damage to a man's fame, as if the matter whereof he is accused be scandalous"; (2) damage to the person; (3) damage to property, "as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused." As to (1), it has been held by the Court of Appeal²⁹ that the test is whether the charge is necessarily and naturally defamatory of the plaintiff, or, in other words, whether the statement that the plaintiff was charged with the offence in question is capable of a non-defamatory meaning. This is a very severe test. It has been held³⁰ that a conviction for pulling a communication cord on a train without reasonable cause, contrary to the Regulation of Railways Act, 1868, section 22, does not damage the "fair fame" of the person charged, because he might have done so for a number of reasons—e.g., because he had left valuable property behind on the platform. Paradoxically, a charge of failing to pay a tram-car fare has been held such an offence,³¹ apparently because it necessarily involves fraud.³² The decisions are open to review on the ground that they misunderstand Sir John Holt's test: what he really meant was whether an oral imputation of the crime would have amounted to a slander actionable *per se*.³³

As to (2), damage to the person, the courts have in this instance interpreted *Savile v. Roberts* in an unexpectedly wide way, by holding that it covers any crime punishable with imprisonment in the first instance, even though the plaintiff has not in fact been imprisoned.³⁴

²⁸ *Savile v. Roberts* (1698) 1 Ld. Raym. 374.

²⁹ *Wiffen v. Bailey* [1915] 1 K.B. 600.

³⁰ *Berry v. British Transport Commission* [1962] 1 Q.B. 306.

³¹ *Rayson v. South London Tramways Co.* [1893] 2 Q.B. 304.

³² *Nimmo v. Lanarkshire Tramways*, 1912 S.C. 23; *Wiffen v. Bailey* [1915] 1 K.B. 600.

³³ See Diplock J. in *Berry v. British Transport Commission* [1961] 1 Q.B. 149, 166 (not disapproved in C.A. [1962] 1 Q.B. 306).

³⁴ *Wiffen v. Bailey* [1915] 1 K.B. 600. Note the analogy with slander actionable *per se*.

As to (3), damage to property, it has now been held that the difference between party and party costs and solicitor and client costs is sufficient damage to found an action.³⁵

(2) Malicious bankruptcy and liquidation proceedings

A similar liability attaches to him who maliciously and without reasonable cause petitions to have another person adjudicated a bankrupt,³⁶ or to have a company wound up as insolvent.³⁷

(3) Malicious arrest

Similarly it is an actionable injury to procure the arrest and imprisonment of the plaintiff by means of judicial process, whether civil or criminal, which is instituted maliciously and without reasonable cause.³⁸ This species of wrong is to be distinguished from false imprisonment. False imprisonment is the act of the defendant himself or of a merely ministerial officer put in motion by him. Under the old practice the appropriate remedy was a writ of trespass, and, speaking generally, neither malice nor want of reasonable and probable cause was or is required. But in malicious arrest the imprisonment is effected by or in pursuance of the valid order or judgment of a judge or magistrate; no action of trespass would lie; the remedy was in case for wrongfully abusing the process of the court; and there was and is no cause of action except on proof of malice and want of reasonable cause.

(4) Malicious execution against property

On the same principle it is an actionable wrong maliciously and without reasonable and probable cause to issue execution against the property of a judgment debtor.³⁹

The bringing of an ordinary civil action (not extending to any arrest or seizure of property) is not a good cause of action, however unfounded, vexatious and malicious it may be.⁴⁰ The

³⁵ *Berry v. British Transport Commission* [1962] 1 Q.B. 306.

³⁶ *Johnson v. Emerson* (1871) L.R. 6 Ex. 329.

³⁷ *Quartz Hill Gold Mining Co. v. Eyre* (1883) 11 Q.B.D. 674.

³⁸ This sentence was cited with approval in *Foth v. O'Hara* (1959) 15 D.L.R. (2d) 332, 336. Since the abolition of arrest on meane process, the grounds for such an action are not likely to arise, but it is still conceivable in one or two cases: Winfield, *Present Law*, p. 208.

³⁹ *Clissold v. Cratchley* [1910] 2 K.B. 244.

⁴⁰ *Quartz Hill Gold Mining Co. v. Eyre* (1883) 11 Q.B.D. 674, 689. It has also been held that no action lies for conspiracy to give perjured evidence:

reason alleged for this rule is that an unfounded and unsuccessful civil action is not the cause of any damage of which the law can take notice. Even for the injury which baseless accusations made in a civil action may inflict upon the reputation of the defendant it would seem that no action lies. It seems that a litigant may maliciously and without any reasonable ground make the gravest charges of fraud or other disgraceful conduct without incurring any other liability than that of paying the costs of the proceedings. To what classes of civil proceedings this exemption applies is far from clear. Will an action lie at the suit of a person maliciously joined as a co-respondent in a divorce suit,⁴¹ or at the suit of a person against whom affiliation proceedings have been maliciously taken, or at the suit of a solicitor whom the defendant has maliciously endeavoured to have struck off the roll? If malicious proceedings in bankruptcy are, as we have seen, a good cause of action, there seems no reason why a similar conclusion should not be drawn with respect to the proceedings mentioned.⁴² Again, there seems to be no reason why an action should not lie for the institution of unfounded and malicious proceedings before a court-martial,⁴³ or some administrative or domestic tribunal.⁴⁴ The adverse decision of such a body may cause serious damage to the reputation or livelihood of the party accused.

§ 171. Conditions of Liability

In order that an action shall lie for malicious prosecution or the other forms of abusive process which have been referred to, the following conditions must be fulfilled:—

- (1) The proceedings must have been instituted or continued by the defendant;

Cabassi v. Vila (1940) 64 C.L.R. 180; *Hargreaves v. Bretherton* [1959] 1 Q.B. 45. Cf. *Roberts v. Stone (J. F.), Ltd.* (1945) 172 L.T. 240 (action lies for non-appearance of witness summoned *subpoena*).

⁴¹ No, according to *Fenn v. Paul* (1932) 32 S.R.(N.S.W.) 315.

⁴² As a matter of history there is no reason why such an action should not lie: Winfield, *Present Law*, p. 202. It is said that an action will lie for procuring a search warrant to be issued maliciously and without reasonable and probable cause: *Everett v. Ribbands* [1952] 2 Q.B. 198, 205.

⁴³ In *Fraser v. Balfour* (1918) 87 L.J.K.B. 1116 the H.L. held that the question was still open. The question is fully discussed by McCardie J. in *Heddon v. Evans* (1919) 35 T.L.R. 642 (fuller report in R. O'Sullivan, *Military Law and the Supremacy of the Civil Courts*, 1921). Winfield, *Present Law*, p. 202.

- (2) He must have acted without reasonable and probable cause;
- (3) He must have acted maliciously;
- (4) In certain classes of cases the proceedings must have been unsuccessful—that is to say, must have terminated in favour of the plaintiff now suing.

We shall deal with these requirements in their order.

(1) Institution of proceedings

The proceedings complained of by the plaintiff must have been instituted by the defendant—that is to say, he must be the person who put the law in motion against the plaintiff. It is not necessary, however, that he should be a party to the proceedings. Thus an action for malicious abuse of process will lie against the solicitor who in his client's name has set the law in motion against the plaintiff.⁴⁵ So in the case of malicious prosecution by way of indictment in the name of the Queen, the person liable is the prosecutor to whose instigation the proceedings are due. Instigating a prosecution is to be distinguished, however, from the act of merely giving information on the strength of which a prosecution is commenced by someone else in the exercise of his own discretion,⁴⁶ although the distinction may be a fine one in particular cases. One who has been bound over to prosecute when magistrates have decided to send the case forward for trial on indictment probably cannot deny that he has instituted the prosecution if the action of the magistrates is the natural and reasonable result of his accusation.⁴⁷

(2) Want of reasonable and probable cause

No action lies for the institution of legal proceedings, however malicious, unless they have been instituted without reasonable and probable cause.⁴⁸ This is a difficult part of the law and two points may be noted at the outset. First, the burden of proving

⁴⁵ *Johnson v. Emerson* (1871) L.R. 6 Ex. 329.

⁴⁶ *Casey v. Automobiles Renault Canada, Ltd.* (1964) 46 D.L.R. (2d) 665.

⁴⁷ *Fitzjohn v. Mackinder* (1860) 8 C.B.(N.S.) 78. The proceedings need not have reached a stage when they can be accurately described as a prosecution: it is enough if damage to the plaintiff may result: *Mohammed Amin v. Bannerjee* [1947] A.C. 322.

⁴⁸ *Willans v. Taylor* (1829) 6 Bing. 183, at 186, *per Tindal C.J.*: "Malice alone is not sufficient, because a person actuated by the plainest malice may none the less have a justifiable reason for prosecution."

absence of reasonable and probable cause is on the plaintiff, who thus undertakes the notoriously difficult task of proving a negative.⁴⁹ Secondly, the existence of reasonable and probable cause is a question for the judge and not for the jury.⁵⁰ This anomalous rule was established as a precaution against erroneous verdicts for the plaintiff—*per doubt del lay gents*. The question was withdrawn from the jury under the pretence that it was a question of law. Still, the rule is subject to the qualification that all preliminary questions of fact on which this issue depends are for the jury. Thus if the defendant alleges that he prosecuted the plaintiff because of information received from a third person, it is for the jury to say whether that information was really received by the defendant and (if the question is relevant) whether it was really believed by him, and it is for the judge to decide whether, if it was so received and believed, it constituted a reasonable ground for the prosecution.⁵¹ This division of functions between judge and jury may be effected at the discretion of the judge in one of two ways. He may either direct the jury to find the facts specially and then decide for himself on the facts so found whether there was reasonable and probable cause, or he may tell the jury that if they find the facts to be such and such then there is reasonable and probable cause, and if they find the facts to be otherwise then there is none, thus leaving the jury to find a general verdict on this hypothetical direction.⁵²

⁴⁹ *Abrath v. N.E. Ry. Co.* (1883) 11 Q.B.D. 440. Otherwise in false imprisonment: *Hicks v. Faulkner* (1878) 8 Q.B.D. 167, 170.

⁵⁰ *Lister v. Perryman* (1870) L.R. 4 H.L. 521. So also in false imprisonment: *Hailes v. Marks* (1861) 7 H. & N. 56.

⁵¹ *Herniman v. Smith* [1938] A.C. 305, 316–317. Since this is an inference of fact, the judge necessarily has to determine it without any guidance from precedent, for each case depends on its own facts, and his task might therefore be thought to be a difficult one. Yet Lord du Parcq said: “A judge is frequently set the task of deciding whether there was ‘reasonable and probable cause’ for an action and I have heard no complaint that the question is too vague to be answered with accuracy”—*Tyne Improvement Commissioners v. Armement Anversoils S/A* [1949] A.C. 326, at 353.

⁵² *Abrath v. N.E. Ry. Co.* (1883) 11 Q.B.D. 440, 458. In some cases the question has been left to the jury whether the defendant took reasonable care to ascertain the facts, but to ask such a question is to take the decision of the issue out of the hands of the judge to whom in the interests of prosecutor and accused alike it has been confided. It is impossible to distinguish the question whether the defendant showed reasonable care and judgment in ascertaining the facts from the question whether he showed

Reasonable and probable⁵³ cause means a genuine belief, based on reasonable grounds, that the proceedings are justified. The defendant is not required to believe that the accused is guilty: it is enough if he believes there is reasonable and probable cause for a prosecution.⁵⁴ He need only be satisfied that there is a proper case to lay before the court.⁵⁵ In *Hicks v. Faulkner*⁵⁶ Hawkins J. said, "I should define reasonable and probable cause to be an honest belief in the guilt of the accused, based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accused, to the conclusion that the person charged was probably guilty of the crime imputed."⁵⁷ The prosecutor must himself honestly believe in the case which he is making: it is not enough that he is acting (if a police officer) on the instructions of his superiors,⁵⁸ or in blind reliance on the opinion of counsel.⁵⁹ In short, the test is subjective and not objective.

The question whether the defendant possessed such an honest belief should not be left to the jury in every case, but only if it is in dispute and the plaintiff leads some evidence of its absence.⁶⁰ If it were asked in every case it would put every police officer at

reasonable care and judgment in estimating the significance of facts known to him, and both questions are equally for the judge: *Herniman v. Smith* [1938] A.C. 305, 316-317.

⁵³ The terms reasonable and probable are synonyms. *Probabilis causa* was an expression which was not unknown in classical Latin and became familiar in medieval usage (see references in 6th ed., p. 590). *Probabilis* means primarily provable—hence capable of being put to the test—hence reliable, approved, right, good, justifiable. *Probabilis causa* means a good reason—a ground of action which commends itself to reasonable men. (The definition in this footnote was approved by Lord Aitchison in *Robinson v. Keith*, 1936 S.C. 25, 48.) See also C. K. Allen, 54 L.Q.R. 15-16.

⁵⁴ *Tempest v. Snowden* [1952] 1 K.B. 130, 135.

⁵⁵ *Gliniski v. McIver* [1962] A.C. 726, 758.

⁵⁶ (1878) 8 Q.B.D. 167, at 171.

⁵⁷ Lord Atkin, in a judgment concurred in by other members of the House, said he knew of no better statement than this: *Herniman v. Smith* [1938] A.C. 305, 316. But Sir Raymond Evershed M.R. remarked that "If that is the meaning of the question 'Was there reasonable and probable cause,' it is no wonder that it is a question not to be left to a jury": *Tempest v. Snowden* [1952] 1 K.B. 130, 135.

⁵⁸ *Gliniski v. McIver* [1962] A.C. 726, 756, 769.

⁵⁹ *Abbott v. Refuge Assurance Co., Ltd.* [1962] 1 Q.B. 432, 456; *Gliniski v. McIver* [1962] A.C. 727, 745.

⁶⁰ *Gliniski v. McIver* [1962] A.C. 726, 744, 768.

the mercy of an accused who happened to be acquitted.⁶¹ The plaintiff must give some evidence from which the actual belief of the defendant can be inferred: merely to prove that the defendant had before him information which might or might not have led a reasonable man to form an opinion that the plaintiff was guilty supplies no evidence that the defendant did not believe him to be guilty.⁶² When honest belief is in issue the question left to the jury should be in the form "Did the defendant honestly believe in the charges he was making?"⁶³ The question should not contain any reference to reasonable grounds for belief. For to ask the jury whether the defendant had an honest belief that he had reasonable and probable grounds for prosecuting is to ask them a question (albeit one of fact) which it is for the judge alone to answer.⁶⁴

Grounds for belief

Further, even if the defendant honestly believed the proceedings to be justified there is no reasonable and probable cause unless this belief was based on reasonable grounds. This question is to be determined by the facts actually known to the defendant at the time when he laid the information and subsequently proceeded with the prosecution, not to the facts as they actually existed.⁶⁵ So facts unknown to the prosecutor do not prevent the facts which were known to him from constituting reasonable and probable cause.⁶⁶ When a person embarks upon a prosecution without any evidence at all or with evidence on which no reasonable jury would convict, then (whatever his state of mind) there is strong evidence that he had no reasonable and probable cause.⁶⁷ Further, one who continues a prosecution, which has been instituted with reasonable and probable cause, after he has discovered facts which indicate that it is groundless

⁶¹ *Dallison v. Caffery* [1965] 1 Q.B. 348, 368.

⁶² *Mitchell v. Heine (John) & Sons, Ltd.* (1938) 38 S.R.(N.S.W.) 466.

⁶³ *Gliniski v. McIver* [1962] A.C. 726, 761, 767.

⁶⁴ *Tempest v. Snowden* [1952] 1 K.B. 130.

⁶⁵ *Herniman v. Smith* [1938] A.C. 305, 315. The question of reasonable and probable cause is one which the court has to determine objectively on the evidence before it: *Tims v. John Lewis & Co., Ltd.* [1951] 2 K.B. 459, 472. But the prosecutor need not test every fact: "His duty is not to ascertain whether there is a defence but whether there is reasonable and probable cause for a prosecution"—[1938] A.C. at 319, *per* Lord Atkin.

⁶⁶ *Herniman v. Smith* [1938] A.C. 305; *Wright v. Sharp* (1947) 176 L.T. 308.

⁶⁷ *Tims v. John Lewis & Co., Ltd.* [1951] 2 K.B. 459, 472-474 (reversed on another point, [1952] A.C. 676).

may well be held to have no reasonable and probable cause for continuing unless he at least informs the court of the facts which have been discovered.⁶⁷ Having regard, however, to the facts known to the defendant, he must show a reasonably sound judgment and use reasonable care in determining whether there are sufficient grounds for the proceedings instituted by him, and any failure to exhibit such judgment or care will be imputed to him as a want of reasonable and probable cause.⁶⁸ It may be inferred from *Herniman v. Smith*,⁶⁹ in which the point was allowed to go by default, that it is not enough in itself to establish a reasonable or probable cause that the plaintiff was committed for trial or even that he was convicted by a court at first instance and subsequently acquitted on appeal. This seems good sense, for, though these facts would be weighty evidence of a reasonable and probable cause, they should not be conclusive. The original conviction might have been obtained as a result of the prosecutor's own fraud or of evidence of which he was unaware.

(3) Malice

No action will lie for the institution of legal proceedings, however destitute of reasonable and probable cause, unless they are instituted maliciously—that is to say, from some wrongful motive.⁷⁰ Malice and absence of reasonable and probable cause must unite in order to produce liability. So long as legal process is honestly used for its proper purpose, mere negligence or want of sound judgment in the use of it creates no liability; and, conversely, if there are reasonable grounds for the proceedings (for example, the probable guilt of an accused person) no impropriety of motive on the part of the person instituting these proceedings is in itself any ground of liability. Therefore it is necessary to distinguish between honesty of belief and honesty of motive: the former is relevant to the question of reasonable and probable cause, the latter to the question of malice.

⁶⁸ The circumstance that the mistake of the defendant is one of law and not of fact does not necessarily amount to proof of want of reasonable and probable cause. The duty of a prosecutor is merely to show due judgment, care and discretion as to the guilt of the accused in law no less than in fact: *Phillips v. Naylor* (1859) 4 H. & N. 565.

⁶⁹ [1988] A.C. 805. See Winfield, Note, 53 L.Q.R. 12.

⁷⁰ *Williams v. Taylor* (1829) 6 Bing. 183, 186.

Malice means the presence of some improper and wrongful motive—that is to say, an intent to use the legal process in question for some other than its legally appointed and appropriate purpose.⁷¹ It can be proved either by showing what the motive was and that it was wrong, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor⁷²: for example, prosecuting a person for theft in order to deter others from committing similar depredations,⁷³ the levying of blackmail, or the coercion of the accused in respect of some unconnected matter, such as the obtaining of compensation or restitution from the accused (the civil law, not the criminal, being the appropriate instrument for this purpose). But it is not malicious to prosecute a man as a condition precedent to suing him civilly, for that is just what the rule in *Smith v. Selwyn*⁷⁴ requires should be done before a defrauded person can get his money back.⁷⁵ Again, a prosecution is not malicious merely because inspired by anger for the injury suffered,⁷⁶ for this is one of the motives on which the law relies to secure the prosecution of offenders against the criminal law.⁷⁷

Burden of proof

The burden of proving malice lies on the plaintiff; and, subject to two qualifications, the question is one for the jury and not, like that of reasonable and probable cause, one for the judge.⁷⁸ The first of these qualifications is that the question whether any particular motive is a proper or improper motive for the proceeding in question is a matter of law for the determination of the judge. Malice is any motive of which the law disapproves, not any motive which is displeasing to a jury. The jury has merely to decide whether the motive exists. The second qualification is that there must be some reasonable evidence of

⁷¹ This definition was cited by Barry J. in *Pike v. Waldrum* [1952] 1 Lloyd's Rep. 431, 451.

⁷² *Brown v. Hawkes* [1891] 2 Q.B. 718, 722.

⁷³ *Stevens v. Midland Counties Ry.* (1854) 10 Ex. 352, 356.

⁷⁴ [1914] 3 K.B. 98. See below, § 226.

⁷⁵ *Abbott v. Refuge Assurance Co., Ltd.* [1962] 1 Q.B. 432, 462.

⁷⁶ As distinct from anger at some other activity of the accused—e.g., his perjured evidence in other proceedings: *Gliniski v. McIver* [1962] A.C. 726.

⁷⁷ *Brown v. Hawkes* [1891] 2 Q.B. 718, 722.

⁷⁸ *Mitchell v. Jenkins* (1838) 5 B. & Ad. 588.

malice, otherwise the case will be withdrawn from the jury.⁷⁹ Want of reasonable and probable cause is itself in certain cases sufficient evidence of malice to go to a jury.⁸⁰ Nevertheless, a jury is not at liberty in all cases to infer malice from want of reasonable cause. Want of reasonable cause is sufficient evidence of malice in those cases only in which it is sufficient evidence that there was no genuine belief in the accusation made. If it appears that there was such a belief, the plaintiff must produce some independent evidence of malice, and cannot rely on the absence of reasonable cause. On the other hand, malice is in general never evidence of want of reasonable cause,⁸¹ unless the same fact supplies evidence both of malice and of absence of reasonable and probable cause, as where it is established that when the defendant instituted the prosecution he knew that the plaintiff was innocent.⁸² For a prosecutor may be inspired by malice and yet have a genuine and reasonable belief in the truth of his accusation.⁸³

(4) Termination of the proceedings in favour of the plaintiff

No action for a malicious prosecution, or for any other malicious proceeding which involves a judicial decision of any question at issue between the parties, will lie until or unless the prosecution or other proceeding has terminated in favour of the person complaining of it. No person, for example, who has been convicted on a criminal charge can sue the prosecutor for malicious prosecution even though he can prove that he is an innocent man and that the accusation was a malicious and unfounded one.⁸⁴ Even if the prosecution or other proceeding is still pending, the same rule applies. "It is a rule of law that no one shall be allowed to allege of a still depending suit that it is unjust."⁸⁵ If the prosecution has actually determined in any manner in favour of the plaintiff it matters nothing in what way this has taken place. There need not have been any acquittal on the merits. What the plaintiff requires for his action is not a

⁷⁹ *Brown v. Hawkes* [1891] 2 Q.B. 718.

⁸⁰ *Ibid.* at 723.

⁸¹ *Johnstone v. Sutton* (1786) 1 T.R. 510, 514.

⁸² *Mitchell v. John Heine & Sons, Ltd.* (1938) 38 S.R. (N.S.W.) 466.

⁸³ *Glinks v. McIver* [1962] A.C. 726, 782.

⁸⁴ *Baseé v. Matthews* (1867) L.R. 2 C.P. 684. See the criticism of this case in *Winfield, Tort*, pp. 708-709.

⁸⁵ *Gilding v. Eyre* (1861) 10 C.B.(n.s.) 592, at 604, *per curiam*.

judicial determination of his innocence but merely the absence of any judicial determination of his guilt. Thus it is enough if the prosecution has been discontinued,⁸⁶ or if the accused has been acquitted by reason of some formal defect in the indictment,⁸⁷ or if a conviction has been quashed,⁸⁸ even if for some technical defect in the proceedings.⁸⁹ Conversely, if the proceedings have actually determined against the plaintiff it is immaterial that the judgment cannot be attacked by way of appeal.⁹⁰ This rule applies not only to malicious prosecution but to all malicious proceedings which involve the judicial determination of any question at issue. Thus no action will lie for maliciously procuring the plaintiff to be adjudicated a bankrupt, until and unless the adjudication has been set aside.⁹¹ But the rule does not apply to proceedings which involve no such judicial decision.⁹²

§ 172. Proceedings Instituted Erroneously and Irregularly

Having considered the liability of litigants for the malicious abuse of legal process, it remains to consider how far they are responsible for mere errors and irregularities of procedure in the absence of any malice. The rule is that no action will lie against any person for procuring an erroneous decision of a court of justice. This is so even though the court has no jurisdiction in the matter and although its judgment or order is for that or any other reason invalid. A court of justice is not the agent or servant of the litigant who sets it in motion so as to make that litigant responsible for the errors of law or fact which the court commits.⁹³ Every party is entitled to rely absolutely on the presumption that the court will observe the limits of its own jurisdiction and decide correctly on the facts and the law. Thus in *Lock v. Ashton* ⁹⁴ the defendant had wrongly though

⁸⁶ *Watkins v. Lee* (1839) 5 M. & W. 270.

⁸⁷ *Wicks v. Fentham* (1791) 4 T.R. 247.

⁸⁸ *Herniman v. Smith* [1938] A.C. 305, 315. This was assumed rather than decided, but it seems correct.

⁸⁹ The preceding four sentences were cited with approval by Schroeder J.A. in *Romegialli v. Marceau* (1963) 42 D.L.R. (2d) 481, 483.

⁹⁰ *Everett v. Ribbands* [1952] 2 Q.B. 198.

⁹¹ *Metropolitan Bank v. Pooley* (1885) 10 App.Cas. 210.

⁹² *Gilding v. Eyre* (1861) 10 C.B.(N.S.) 592.

⁹³ See above, § 50.

⁹⁴ (1848) 12 Q.B. 871.

honestly arrested the plaintiff and charged him with an offence before a magistrate, who thereupon remanded him in custody. It was held that although the defendant was liable for the original arrest (as being his own wrongful act) he was not responsible for the subsequent remand, which was merely an erroneous act of the magistrate. But a party who has actually misled the tribunal by his fraud or malice may be liable, and there is even authority for saying that one who prefers a charge to a magistrate (even though in vague language and by way of suspicion) is liable for the ulterior consequences and may not say they were due to the mistake or indiscretion of the tribunal he has set in motion.⁹⁵

No action will lie against any person for issuing execution or otherwise acting in pursuance of a valid judgment or order of a court of justice even though it is erroneous and even though it is afterwards reversed or set aside for error.⁹⁶ A valid judgment, however erroneous in law or fact, is a sufficient justification for any act done in pursuance of it. The remedy of an aggrieved litigant is some form of appeal whereby the judgment may be reversed or set aside and not an action for damages against those who enforce or act on the judgment while it stands. If, however, any litigant executes any form of legal process which is invalid for want of jurisdiction, irregularity, or any other reason, and in so doing he commits any act in the nature of a trespass to person or property he is liable therefor in an action of trespass and it is not necessary to prove any malice or want of reasonable or probable cause. This is an application of the fundamental principle that mistake, however honest or inevitable, is no defence for him who intentionally interferes with the person or property of another. A supposed justification is no justification at all. A litigant who effects an arrest or seizes property must justify the trespass by pleading a valid execution of legal process and any irregularity or error which has the effect of making the process invalid will deprive him of all justification.⁹⁷ But a distinction is to be drawn between process which is wholly void and process which is merely voidable. Process which is void

⁹⁵ *Fitzjohn v. Mackinder* (1860) 8 C.B.(N.S.) 78.

⁹⁶ *Williams v. Williams* [1937] 2 All E.R. 559.

⁹⁷ *Painter v. Liverpool Oil Gas Light Co.* (1886) 8 Ad. & E. 433.

is no defence at all and an action will lie without taking any steps to set it aside.⁹⁸ But when process is merely voidable it is a sufficient justification until it has been set aside; though when it has been set aside it becomes void *ab initio* and an action will thereupon lie for acts done in pursuance of it.

§ 173. Maintenance and Champerty⁹⁹

Maintenance

To procure any person by means of pecuniary assistance, or possibly in other ways,¹ to institute, carry on, or defend civil proceedings² is in the absence of lawful justification a wrong actionable at the suit of the other party to those proceedings. The tort is not actionable *per se*: the plaintiff must show actual damage.³ This tort is known as that of maintenance. "The essence of the offence is intermeddling with litigation in which the intermeddler has no concern."⁴ It will be noted that the tort differs from malicious prosecution in several respects. The plaintiff need not prove malice or absence of reasonable and probable cause and (in theory) it is irrelevant whether the party maintained was successful. Thus in *Bradlaugh v. Newdegate*⁵ the plaintiff had been unsuccessfully sued in a former action brought by one Clarke for the recovery of the statutory penalty for sitting and voting in Parliament without having taken the necessary oath. Clarke was a person of no means and unable to pay the plaintiff's costs. The action had been instigated and procured by the defendant Newdegate, who had supplied the necessary funds and had given Clarke a guarantee against all expenses. It was held that the plaintiff was entitled to recover from the defendant all the costs which he had incurred in the action brought against him by Clarke. Further, the doctrine of

⁹⁸ *Brooks v. Hodgkinson* (1859) 4 H. & N. 712. Whether any particular irregularity makes process wholly void or only voidable is a question pertaining to the details of the procedure of the court in question.

⁹⁹ For the history, see Winfield, *History*, Chap. 6; Holdsworth, H.E.L. iii, pp. 395-399, viii, pp. 397-402.

¹ See Winfield, *Present Law*, pp. 19-21.

² This covers any contentious proceedings where property is in dispute which becomes the subject of an agreement to share the proceeds: *Re Trepcu Mines, Ltd. (No. 2)* [1963] Ch. 199, 220.

³ *Neville v. London Express Newspaper, Ltd.* [1919] A.C. 368; *Siewwright v. Ward* [1935] N.Z.L.R. 43.

⁴ [1919] A.C. 368, at 385, *per* Lord Finlay.

⁵ (1889) 11 Q.B.D. 1.

maintenance applies solely to the instigation of civil proceedings. To set the criminal law in motion is the right of every member of the public, and is not actionable unless those conditions of liability exist which are required by the law of malicious prosecution.⁶

Defences

Maintenance is still both a tort and a crime except insofar as it can be brought within one of the recognised exceptions to the rule which prohibits it.⁷ One of these exceptions occurs when the defendant has (or believes himself to have) an interest in the action maintained by him. The nature of the interest required to justify a third party maintaining the prosecution or defence of an action is not too clear. It has been held that the common interest which will justify such maintenance must be some legal interest in the subject-matter of the suit, as distinct from a merely sentimental or aesthetic interest.⁸ But the actions maintained in these cases were for libel and slander—wrongs essentially personal—and a broader view has been adopted in an action for pollution of a river.⁷ In such a case a mutual protection society will have a good defence if it is in substance a body of persons having legal interests as riparian owners or holders of fishing rights or legitimate and genuine business interests in the prevention of pollution—*e.g.*, the owners of local fishermen's hotels.⁹ Thus co-owners of property or a landlord and his tenant may maintain one another in the defence of their common interests. It is also a sufficient justification that the defendant was actuated solely by charitable motives—*i.e.*, by a desire to assist a poor man to obtain justice that would otherwise be beyond his reach.¹⁰ There may be other justifications for maintenance in addition to the two already mentioned, but it is impossible to say what they are.¹¹ “In these days of insurance

⁶ *Grant v. Thompson* (1895) 72 L.T. 264.

⁷ *Martell v. Consett Iron Co., Ltd.* [1955] Ch. 363.

⁸ *Oram v. Hutt* [1914] 1 Ch. 98.

⁹ *Martell's Case* [1955] 363, 418.

¹⁰ *Holden v. Thompson* [1907] 2 K.B. 489. As to solicitors acting for poor persons, see *Wiggins v. Lavy* (1928) 44 T.L.R. 721; *Sievwright v. Ward* [1936] N.Z.L.R. 43.

¹¹ Winfield, *Present Law*, pp. 21–84, gives the following additional justifications: (1) professional legal assistance; (2) possibly, kinship; (3) possibly, the relationship of master and servant.

policies giving an indemnity against both damages and costs to wrongdoers, trade unions whose rules provide for paying the legal costs of their members, and the Legal Aid Acts, maintenance is not now regarded with the same repugnance as it was by the old common law.”¹²

Maintained proceedings successful

It is no defence to an action for maintenance that the maintained proceedings were successful and therefore justifiable.¹³ The common law does not approve of the intervention of any man in the litigation of another with which he has no lawful concern, whether that litigation is well founded or not. But since the liability of the other party to pay the amount of the judgment against him, or to pay his own costs in defending a good claim against him, or in instituting an unfounded claim against another, is not regarded by the law as amounting to legal damage for which he can recover compensation against the maintainer there would seem to be no practical importance in the rule that a man is responsible for maintaining successful litigation. So in *Neville v. London Express Newspaper Ltd.*¹⁴ the defendants had assisted persons who had been defrauded by the plaintiff in connection with sales at New Anzac-on-Sea (now Peacehaven) to recover their moneys in an action. They had helped to get justice done. Would an action for maintenance lie against them? Two logical answers were possible. Lord Atkinson and Lord Haldane held that since every subject has a legal right not to be harried in courts of justice by maintained actions brought by officious intermeddlers who have no legitimate interest in their subject-matter, therefore even if the plaintiff has lost nothing, he should still have his action for nominal damages on the principle of *Ashby v. White*.¹⁵ Lord Shaw and Lord Phillimore with equal logic held that maintenance is actionable only if it is to the hindrance or disturbance of common right, to the delay or distortion or withholding of justice, and that the plaintiff must have suffered actual damage therefrom. Where the action maintained has succeeded

¹² *Baker v. Jones* [1954] 1 W.L.R. 1005, at 1011, *per* Lynskey J. See also *Martell v. Consett Iron Co., Ltd.* [1955] Ch. 363.

¹³ *Neville v. London Express Newspaper, Ltd.* [1919] A.C. 368.

¹⁴ [1919] A.C. 368.

¹⁵ (1703) 2 Ld.Raym. at 955, *per* Holt C.J. Winfield thinks that this view was correct: *Present Law*, pp. 81-88; 35 L.Q.R. 235.

justice is not denied, the plaintiff must have suffered no wrong, and can obtain no damages. It is maintenance, but the justification or excuse is to be found in the righteousness of the suit and the proof of its righteousness is its success.¹⁶ Lord Finlay held illogically: (1) that the success of the maintained litigation is not a bar to the right of action for maintenance, but (2) that the action will not lie in the absence of proof of special damage, whilst admitting that there is no such damage where a man is compelled to discharge his legal obligations.¹⁷ Since Lord Finlay had a casting vote upon each proposition the law remains in that unsatisfactory and illogical position.¹⁸

ChamPERTY

ChamPERTY (*campi partitio*) is that form of maintenance in which the person maintaining takes as his reward a portion of anything which may be gained as a result of the proceedings. The rules on the matter go back to 1219. Thus a solicitor who conducts proceedings on the basis of payment proportioned to the amount recovered is guilty of the criminal offence of champerty, and is liable to a civil action.¹⁹

On the other hand, when a solicitor is retained to conduct litigation on the ordinary terms, he is not debarred from acting merely because he knows that his client has made a champertous agreement to share the proceeds with another.²⁰ He will only be guilty of champerty if he has taken an active part in the preparation of the agreement. The dividing line is important to an English solicitor asked to act for parties resident in a jurisdiction where litigation on a contingency fee basis is lawful—*e.g.*, the U.S.A. or the common market countries. Charitable motives are no defence to proceedings for champerty. "Charity may be indiscreet, but must not and, indeed, cannot be mercenary."²¹

¹⁶ Holdsworth thinks that this is the proper view: H.E.L. viii, pp. 400–402.

¹⁷ The following year Lord Finlay suggested two instances where the plaintiff might be able to prove special damage even though he had been unsuccessful in the maintained proceedings: *Weld-Blundell v. Stephens* [1920] A.C. 956, 968–970.

¹⁸ *Constantine v. London Imperial Hotels* [1944] K.B. 693, 702.

¹⁹ *Re Trepcia Mines, Ltd.* [1963] Ch. 199.

²⁰ *Re Trepcia Mines, Ltd.* [1963] Ch. 199.

²¹ *Cole v. Booker* (1913) 29 T.L.R. 295, at 296, *per* Bailhache J.

CHAPTER 21

PARTIES

§ 174. The Crown

THE law on this topic was greatly changed by the Crown Proceedings Act, 1947.¹ At common law the procedure by way of petition of right generally provided a remedy against the Crown in cases of breach of contract and possibly also enabled real or personal property to be recovered. But it was impossible to sue the Crown in tort, either for wrongs which it had expressly authorised or for wrongs committed by its servants in the course of their employment. Nor was it possible to sue the head of the department or other official superior of the wrongdoer, for all the servants of the Crown are fellow-servants and do not stand to each other in the relationship of master and servant.² The individual wrongdoer was, of course, liable and could not plead the commands of the king or state necessity as a defence.³ These rules became highly unsatisfactory when the Crown became one of the largest employers of labour and occupiers of property in the country. Various devices were available to ensure that substantial justice was done. Thus the Treasury might, as a matter of grace, undertake to satisfy any judgment awarded against the individual Crown servant who had committed a tort in the course of his employment.⁴ These makeshifts became unnecessary when the Crown Proceedings Act, 1947, was passed.

¹ See Bickford Smith, *The Crown Proceedings Act, 1947*; Glanville Williams, *Crown Proceedings*; Street, *Governmental Liability*; Treitel, "Crown Proceedings" (1957) *Public Law* 321.

² *Bainbridge v. P.-M.-G.* [1906] 1 K.B. 178. Superior servants of the Crown were in no special position in this respect; it is a general principle of the common law: see below, § 193.

³ *Entick v. Carrington* (1765) 19 St.Tr. 1029; *Wilkes v. Halifax (Lord)* (1769) 19 St.Tr. 1406. This is still the law. For the defences of act of State and statutory authority see §§ 18, 175. It has, however, been held that neither the Crown nor its individual servants are liable in negligence for acts or omissions done by H.M. Forces in active operation against the enemy: *Nisbet Shipping Co. v. The King* [1951] 4 D.L.R. 636.

⁴ After 1942 the Crown in practice submitted to arbitration on the preliminary question whether the servant had been acting in the scope of his employment. For the different device of "the nominated defendant" see *Adams v. Naylor* [1946] A.C. 543.

Section 2 (1) of the Act provides as follows:

“Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:—

- (a) in respect of torts committed by its servants or agents;
- (b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer⁵; and
- (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property.”⁶

Proceedings are instituted against the appropriate Government Department (to be selected from a list published by the Treasury), or, if there is doubt about this, against the Attorney-General.

Although the Act appears to have given rise to very few difficulties there are a few points which may be mentioned in detail.

(1) Torts committed by servants or agents

First, it is notable that the proviso to section 2 (1) states that the Crown is not liable unless the act or omission of the servant or agent would (apart from the provisions of the Act) have given rise to a cause of action against him. The object of this proviso may have been to ensure that the Crown could avail itself of any defence open to the primary wrongdoer.⁷ Secondly, the liability of the Crown for the torts of its officers (a term which includes any servant or Minister of the Crown) is restricted to cases where the officer is appointed by it directly or indirectly and was at the material time paid in respect of his duties as an officer of the Crown wholly out of the Consolidated Fund, moneys provided by Parliament,⁸ or a fund certified by the Treasury as equivalent. The main effect of this is to exclude liability for the police, for the funds out of which they are paid are not (even in the case of the Metropolitan Police) provided wholly by Parliament.⁹ In

⁵ See below, § 199.

⁶ The Crown is bound by the Occupiers' Liability Act, 1957.

⁷ See *Grossman v. The King* [1952] 2 D.L.R. 241.

⁸ This means moneys paid out of the Consolidated Fund on the authority of the annual Consolidated Fund Acts or Appropriation Acts instead of on the authority of permanent legislation.

⁹ Nor are they the servants of the police authority which appoints, pays and dismisses them (*Fisher v. Oldham Corporation* [1930] 2 K.B. 364): for the reasons for this see below, p. 657.

any case a constable is not a servant of the Crown in such a sense that the ordinary law of master and servant determines the relationship of the parties.¹⁰ But although a constable is a servant neither of the Crown, nor of the police authority, nor of the chief constable, the Police Act, 1964, section 48, provides that the chief officer of police of any area shall be liable in respect of torts committed by constables under his control in the performance of their functions in like manner as a master is liable in respect of torts committed by his servants in the course of their employment. The chief constable is a joint tortfeasor with the delinquent constable, but the police fund is automatically charged with the payment of any damages or costs awarded against a chief constable. Thirdly, the 1947 Act provides¹¹ that the Crown is not liable for anything done by any person while discharging responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process. Fourthly, there may be difficulty in ascertaining which of the numerous persons, organs and institutions necessary for the government of the United Kingdom today are Crown servants, in the absence of a clear provision in the enabling statute.¹² In particular, questions have arisen as to the status of the public corporations. In *Tamlin v. Hannaford*¹³ the Court of Appeal held that the British Transport Commission was not a servant or agent of the Crown. The court suggested that in general the proper inference, at any rate in the case of commercial corporations,¹⁴ would be that the corporation acted on its own behalf even though controlled by a Government Department. The better view is that hospital authorities are not servants of the Crown.¹⁵

¹⁰ *Att.-Gen. for N. S. W. v. Perpetual Trustee Co.* [1955] A.C. 457.

¹¹ s. 2 (5). The judicial officer himself has certain immunities: above, § 168.

¹² It has, however, been settled since *Mersey Docks Trustees v. Gibbs* (1866) L.R. 1 H.L. 93 that the mere fact that a body has been created by statute for public purposes does not mean that it is a servant or agent of the Crown. See also *Bank voor Handel en Scheepvaart v. Administrator of Hungarian Property* [1954] A.C. 584; Cowen, "The Armed Forces of the Crown" (1950) 66 L.Q.R. 498.

¹³ [1950] 1 K.B. 18

¹⁴ e.g., *The Gas Board and Airways Corporations.*

¹⁵ *Marshall, "Hospitals and Health Service Act"* [1952] C.L.P. 81, 93; *Bullard v. Croydon Hospital Committee* [1958] 1 Q.B. 511, 514.

(2) Breach of statutory duty

Section 2 (2) imposes on the Crown liability for breach of statutory duty¹⁶ when the duty is binding both on persons other than the Crown and on the Crown itself. If the statute expressly states that it binds the Crown (*e.g.*, the Factories Act, 1961, s. 178) no problem arises. If the statute is silent there may be difficulty, for the Act preserves the common law principle of construction that the Crown is not bound by a statute in the absence of express words or necessary implication.¹⁷

(3) Her Majesty's Forces and the Post Office

Although the general object of the Act is to place the Crown in the same position as a private subject it is plain that the Crown cannot in all respects be treated in exactly the same way as a private employer. Hence H.M. Forces and the Post Office occupy a special status.

(i) *H.M. Forces*

By section 10 (1) the Crown is exempt from liability in tort for death or personal injury¹⁸ caused by a member of the armed forces when on duty to another member of the armed forces, provided that the latter is either on duty or is on any land, premises, ship or vehicle being used for the purposes of the armed forces of the Crown, and the Minister of Pensions certifies that the death or injury will be treated as attributable to service for pension purposes.¹⁹ It should be noted that the exemption from liability is extended to the actual wrongdoer himself unless the court is satisfied that the act or omission complained of was not connected with the performance of his duties.²⁰ By section 10 (2)

¹⁶ It is always a question of the construction of the particular statute whether a breach of the duties imposed by it exposes the offender to an action for damages as well as to the penalties (if any) provided by the statute itself: see above, Chap. 11.

¹⁷ The Crown is generally regarded as bound by the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1.

¹⁸ Liability for other torts remains.

¹⁹ See *Adams v. War Office* [1955] 1 W.L.R. 1116.

²⁰ The exemption of the actual wrongdoer has been criticised on the ground that it is contrary to general principles. But if this had not been done there would probably have been a revival of the practice of suing the individual wrongdoer in the hope that the Crown would stand behind him. Injustice may, however, arise in the not unlikely case of a member of the armed forces being killed or injured by the combined negligence of a

the Crown is also exempted from liability in tort for death or personal injury suffered by a member of the armed forces in consequence of the nature or condition of any land, premises, ship, aircraft or vehicle being used for the purpose of the armed forces or in consequence of the nature or condition of any equipment or supplies used for that purpose if the Minister of Pensions certifies that the death or injury will be attributable to service for pension purposes. Any individual officer of the Crown at fault is also exempted.²⁰

(ii) *The Post Office*

Section 9 (1) provides that no proceedings in tort shall lie against the Crown nor (save at the suit of the Crown) against any officer of the Crown while employed as such "for anything done or omitted to be done in relation to a postal packet . . . or telephonic communication."²¹ By section 9 (2), on the other hand, the Crown for the first time undertakes liability for loss of or damage to²² registered inland postal packets when caused by the act or default of a Crown servant. It is not clear whether this is a special statutory cause of action or merely subjects the Crown to ordinary vicarious liability.²³ Proceedings must be begun within twelve months after the packet in question was posted.²⁴

§ 175. Acts of State

It is a fundamental principle of our law that the Crown or its servants must be prepared to justify before the ordinary courts the legality of any act which interferes with the person or property of the subject. The justification must be found in some distinct rule of common law or statute: there is in our law no principle which permits the Crown in time of peace to act for the public

fellow-member of the armed forces and a civilian in circumstances covered by s. 10 (1). In such a case the civilian will be liable for the whole of the plaintiff's damage without any right of contribution or indemnity from the service tortfeasor. We shall see that this is not the only example of such a situation: below, § 181.

²¹ It is less easy to see why the individual wrongdoer has been rendered exempt in this case. It seems that if a postmaster tore up a customer's unregistered letter before his eyes the customer would be without remedy.

²² This covers financial loss or damage: *Building and Civil Engineering Holidays Scheme Management, Ltd. v. Post Office* [1965] 2 W.L.R. 72.

²³ *Building etc. Holidays Scheme, Ltd. v. Post Office* [1965] 2 W.L.R. 72.

²⁴ Law Reform (Limitation of Actions, etc.) Act, 1954, s. 5 (3).

good as it thinks best. This was established in *Entick v. Carrington*.²⁵ The action was one of trespass for breaking and entering the plaintiff's house and seizing his papers.²⁶ The defendants pleaded that they had acted in obedience to warrants issued by the Secretary of State. The Court of Common Pleas held that there was no legal justification for such warrants. "And with respect to the argument of state necessity," said Sir Charles Pratt C.J. in his famous judgment, "the common law does not understand that kind of reasoning." This principle does not apply when the plaintiff is a non-resident alien and the wrong complained of is suffered elsewhere than in British territory,²⁷ and done by the authority, precedent or subsequent, of the Crown. A British subject owes allegiance to the Crown in whatever part of the world he may be; it seems therefore that the Crown cannot plead act of State as against him, wherever the wrong may have been committed,²⁸ but those who owe no allegiance to the Crown may, save in British territory, be dealt with by the Crown as it pleases. This immunity extends to cover the agents of the Crown. Thus in *Buron v. Denman* ²⁹ the defendant, the commander of a British man-of-war, had destroyed certain property of an alien slave-trader on the coast of Africa in circumstances that would have given a good cause of action to a British subject. It was held, however, that inasmuch as the act of the defendant had been ratified by the British Government, it was an act of State for which no action would lie at the suit of an alien. In such cases if redress is to be obtained it must be through diplomatic channels. The Crown or its servant is really contending not that the act is innocent but that the plaintiff has chosen to proceed before a tribunal which has no jurisdiction to inquire into the matter.

This rule has no application in time of peace to injuries

²⁵ (1765) 19 St.Tr. 1030.

²⁶ It is characteristic of our failure to distinguish clearly between public and private law that an important constitutional principle should be established in an ordinary action of tort.

²⁷ Winfield, *Tort*, p. 64, doubts whether it is only if the act is done outside the Queen's dominions that the doctrine applies. See also *R. v. Bottrill* [1947] K.B. 41, at 57.

²⁸ *Walker v. Baird* [1829] A.C. 491. Note that in this case the plaintiff was within the jurisdiction.

²⁹ (1848) 2 Ex. 167. The defendant in this case was a younger son of Lord Denman, at that time C.J.Q.B., who was himself an ardent opponent of the slave trade.

inflicted within the Queen's dominions. An alien friend resident within those dominions owes temporary allegiance to the Queen and has the same legal protection as a British subject against acts committed by or on the authority of the Crown. Thus in *Johnstone v. Pedlar*³⁰ the respondent was an American citizen who resided in Dublin (before the establishment of the Irish Free State) and sympathised actively with Irish nationalism. After serving a sentence of imprisonment for illegal drilling he successfully sued the appellant, the Chief Commissioner of Police, to recover a sum of money which had been found on him at the time of his arrest and the seizure of which had been subsequently adopted as an act of State by the Chief Secretary for Ireland. The decision might have been different if the Crown had actually withdrawn its protection on the ground of his treasonable activities. Similarly, if an alien friend, though resident abroad, owns property in England his title thereto will have the same protection, even against the Crown, as if it belonged to a British subject.³¹ An alien enemy, on the other hand, possesses no rights against the Crown. His residence within the realm by the express or tacit licence of the Crown gives him legal protection against private persons,³² and the courts are open to him, but probably he remains none the less at the mercy of the Crown, which may do with him and with his property as is thought fit. Thus, he may be interned or expelled at pleasure.³³

§ 176. Foreign Sovereigns, Ambassadors and Public Officials

A foreign sovereign is not liable in the English courts for any tort committed by him, unless he has waived his immunity. "The courts of a country will not implead a foreign sovereign. That is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages."³⁴ The only remedy for injuries done

³⁰ [1921] 2 A.C. 262.

³¹ *Commercial and Estates Co. of Egypt v. Board of Trade* [1925] 1 K.B. 271, 290, 297.

³² *Johnstone v. Pedlar* [1921] 2 A.C. 262, 283.

³³ *R. v. Bottrill* [1947] K.B. 41. The problems arising in connection with acts of State are discussed at greater length by McNair, *Legal Effects of War* (3rd ed., 1948).

³⁴ *The Cristina* [1938] A.C. 485, at 490, *per Lord Atkin*. Yet in *Sultan of Johore v. Abubakar* [1952] A.C. 318 the Judicial Committee said there

by him is by way of diplomatic action on the part of the British Government. It makes no difference that the wrongful act is committed in England. A foreign sovereign does not by residing in British territory waive his privilege or submit himself to the jurisdiction of the local courts. Nor does it make any difference that the wrongful act is done by the sovereign in his private capacity. The exemption extends to all the acts of the sovereign and not merely to acts of State.³⁵ But the sovereign's immunity ceases (except possibly for acts of State) upon the termination of his sovereign status, *e.g.*, abdication.³⁶ If the status of a foreign sovereign is in doubt the question is settled by a certificate issued by the Secretary of State on behalf of the Crown, at any rate if the certificate is in conclusive terms.

Diplomatic Immunity

The object of the Diplomatic Privileges Act, 1964, is to replace the old law on the privileges and immunities of diplomatic representatives in the United Kingdom.

The old law is composed partly of statutes going back to the Diplomatic Privileges Act, 1708, and partly of decided cases. It granted a wider degree of immunity to more people than is common in many other countries. Once a person had been accepted as a diplomatic representative by the Foreign Office he was totally immune from the criminal and civil jurisdiction of the English courts during the period of his term of office. In 1964 there were 88 diplomatic missions in London from foreign and Commonwealth countries, and their 6,000 odd members each enjoyed this full immunity.

The new law is mainly contained in the Schedule to the 1964 Act, which gives the force of law to the relevant provisions of the Vienna Convention on Diplomatic Relations, 1961. The Diplomatic Privileges Act, 1964, came into force on October 1, 1964.

The main change made by the Act is to adopt the continental practice of dividing the members of a diplomatic mission into three classes:

had not been finally established any absolute rule that a foreign sovereign could not be impleaded in our courts in any circumstances.

³⁵ *Mighell v. Sultan of Johore* [1894] 1 Q.B. 149.

³⁶ *Munden v. Brunswick (Duke of)* (1847) 10 Q.B. 656.

- (1) Members of the diplomatic staff, who will have full personal immunity, civil and criminal, with three exceptions:
 - (a) a real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purposes of the mission; (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state; (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions;
- (2) members of the administrative and technical staff, who enjoy full immunity for official acts, but who are liable civilly (but not criminally) for acts performed outside the course of their duties;
- (8) members of the service staff, who enjoy immunity for official acts, but are liable civilly and criminally for acts performed outside the course of their duties.

It can thus be seen that for the first time the courts will have power to determine whether an act committed by a member of a diplomatic mission was performed in the course of his duties. An important practical result is that an embassy chauffeur who is involved in a traffic accident will no longer be entitled as of right to have the writ in any proceedings against him set aside, for the court will have power to determine whether he was acting within the scope of his employment.

Visiting forces

Under the Visiting Forces Act, 1952, s. 9, the Minister of Defence has been authorised to make arrangements for the settlement of claims against members of visiting forces from the Commonwealth and States which are parties to the North Atlantic Treaty.⁸⁷ The scheme thus ensures that a claim against an individual member arising out of a tort committed in the performance of an official duty will be satisfied.

⁸⁷ For details, see *Law Society's Gazette*, June 1954, p. 241.

§ 177. Corporations ³⁸

(1) Capacity to be sued

Inasmuch as a corporation is a fictitious person distinct in law from its members, it is not capable of acting *in propria persona*, but acts only through its agents or servants. All the acts, and therefore all the wrongful acts, of a body corporate are in fact the acts of its agents or servants, though imputed in law to the corporation itself. The liability of a body corporate is therefore in all cases a vicarious liability for the acts of other persons. The existence and extent of the liability of a corporation in actions of tort were at one time a matter of doubt, due partly to technical difficulties of procedure and partly to the theoretical difficulty of imputing wrongful acts or intentions to fictitious persons.³⁹ It is now well settled, however, that the liability of a corporation for the torts committed by its agents or servants is governed by the same rules as those which determine the liability of any other principal or employer. This liability extends, moreover, to wrongs of malice or fraud, no less than to wrongs of other descriptions. Thus a corporation can be sued for malicious prosecution, or for malicious libel on a privileged occasion, or for fraudulent misrepresentation,⁴⁰ no less than for trespass, conversion, or negligence.⁴¹

Orthodox rule criticised

It is sometimes said, however, that this liability of a corporation for the acts of its agents or servants exists only where the scope of the authority or employment of those agents or servants is within the statutory or other legal limits of the corporation's powers, and that if a corporation goes beyond the limits set by law for its activities, and enters upon any business or undertaking which is *ultra vires*, it cannot be made liable for torts committed by its agents or servants in the course of that

³⁸ Goodhart, "Corporate Liability in Tort" (1926) 2 Camb.L.J. 350; *Essays* 91.

³⁹ *Abrath v. N. E. Ry.* (1886) 11 App.Cas. 247, 250-251.

⁴⁰ Usually actions of deceit are brought against one or more of the directors or other persons responsible for the misrepresentation; for their liability remains although the claim against the company may be barred by (*e.g.*) the fact that it has gone into liquidation. See *Briess v. Woolley* [1954] A.C. 338; Gower, pp. 314-316.

⁴¹ *Citizens' Life Assurance Co. v. Brown* [1904] A.C. 423.

business or undertaking.⁴² There is, however, no sufficient authority for any such exemption of corporations from the consequences of their disregard of the limits of their powers. It is contrary to practical requirements and has been rejected in numerous American decisions.⁴³

The English decision cited as authority for the exemption of corporations from liability for *ultra vires* torts is *Poulton v. London & S. W. Ry.*⁴⁴ In this case a railway company, having statutory authority to arrest passengers for non-payment of their fares but not for other reasons, was held not responsible for the act of a stationmaster in arresting a passenger for refusing to pay the freight payable for a horse. But the true ground of the decision, common to all the members of the court, was merely that the implied authority of a stationmaster does not extend to the doing of acts which are *ultra vires* of the company, and that in the absence of any proof of express authority the stationmaster was acting beyond the scope of his employment and the company was therefore not responsible.⁴⁵

The true view

In order to discover the law on this subject a distinction must be drawn between the primary representatives of a corporation and its servants. "A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself,"⁴⁶ or it may be the managing director or

⁴² Gower, pp. 95-96. But see Halsbury, Vol. 6, sects. 818, 848; Vol. 9, sects. 178-181.

⁴³ See the authorities cited in 13 Am.Jur., Corporations, § 1121, and 19 C.J.S. Corporations, § 1262, which dispose of the criticisms made by Goodhart, *Essays*, p. 91, of the American cases cited in earlier editions of this work.

⁴⁴ (1867) L.R. 2 Q.B. 534.

⁴⁵ See *Campbell v. Paddington Corporation* [1911] 1 K.B. 869, 878; *Ormiston v. G. W. Ry.* [1917] 1 K.B. 598, 602. See the comment of Mr. Ashton-Cross in (1950) 10 Camb.L.J. 419.

⁴⁶ *Lennard's Carrying Co. v. Asiatic Petroleum Co.* [1915] A.C. 705, at 713, per Lord Haldane.

general manager⁴⁷ or other person having authority from the board of directors to conduct the company's business.⁴⁸ So in *Campbell v. Paddington Corporation*⁴⁹ a metropolitan borough, in pursuance of a formal resolution of its council, erected a stand in a highway which was a public nuisance. It was held that the corporation was liable, although they had no legal right to erect the stand. "To say that, because the borough council had no legal right to erect it, therefore the corporation cannot be sued, is to say that no corporation can ever be sued for any tort or wrong. The only way in which this corporation can act is by its council, and the resolution of the council is the authentic act of the corporation."⁵⁰ Accordingly, the true principle is the following: Every act done, authorised, or ratified on behalf of a corporation by the supreme governing authority of that corporation, or by any person or body of persons to whom the general powers of the corporation are delegated, is for the purpose of the law of torts the act of the corporation itself, whether *intra vires* or *ultra vires* of the corporation, and the corporation is liable accordingly for that act or for any tort committed in respect of it by any agent or servant of the corporation within the scope of his authority or employment.⁵¹

Liability of members

The members of a corporation are not as such liable for torts committed by the corporation. For the purposes of the law of torts, no less than for those of the law of contracts or of property, a body corporate is a personality distinct from its members; and just as a member is not responsible for the debts contracted by

⁴⁷ *Fanton v. Denville* [1932] 2 K.B. 309, 329.

⁴⁸ *Rudd v. Elder Dempster & Co., Ltd.* [1933] 1 K.B. 566, 594. Welsh, "The Criminal Liability of Corporations" (1946) 62 L.Q.R. 345 demonstrates that the criminal law has recently developed on similar lines.

⁴⁹ [1911] 1 K.B. 869.

⁵⁰ *Ibid.* at 875, *per* Avory J.

⁵¹ Dr. Goodhart criticises these views on the ground that an *ultra vires* contract is not binding on a corporation, and that to hold a company liable for an *ultra vires* tort, when it is not held bound by an *ultra vires* contract, would be contrary to the established principles of the law of agency and of master and servant. A corporation, he says, is not liable for torts committed in the course of an *ultra vires* enterprise because it cannot employ a servant to do the act, even if it were done rightfully: 2 Camb.L.J. 350; *Essays*, p. 90. Dr. Goodhart is logical, but Holdsworth (H.E.L. ix, pp. 49-62) says: "Practical convenience rather than theoretical considerations have [*sic*] from the days of the Year Books onwards, determined what activities are possible and what are impossible to a corporation."

a corporation, so also he is not responsible for torts committed by it. From this undoubted principle the very doubtful inference has sometimes been drawn that the members of a corporation are not liable for torts committed by it, even if they have themselves acted as the agents by whom the corporation has so acted.⁵² But it is undoubted law that the servants or agents by whom a corporation commits a tort are themselves personally liable to the same extent as any other servants or agents who commit torts in the service or on behalf of their principals or employers. It is difficult, therefore, to understand why the incorporators themselves, if they act as the agents of the corporation, should not be equally liable for any wrongful acts so committed by them. In any case, it is clear that a corporation is liable to its members for the torts of its agents to the same extent as it is liable to strangers. To this there is one anomalous exception: an action of deceit will not lie against a company at the suit of a shareholder until his allotment of shares has been rescinded.⁵³

(2) Capacity to sue

In general a corporation may sue for any tort (*e.g.*, malicious presentation of a winding-up petition)⁵⁴ in the same way as an individual. The only qualifications are (i) the tort must not be of a kind which it is impossible to commit against a corporation—*e.g.*, assault or false imprisonment; (ii) in case of defamation, it must be shown that the defamatory matter is of such a nature that its tendency⁵⁵ is to cause actual damage to the corporation in respect of its property or business.⁵⁶ Thus an action of libel will lie at the suit of a trading corporation charged with insolvency or with dishonest or incompetent management.⁵⁷ But where there is no actual damage, nor any tendency to produce such damage, no action will lie at the suit of the corporation; the only persons who have any cause of action are the individual

⁵² *e.g.*, by Kelly C.B. in *Mill v. Hawker* (1874) L.R. 9 Ex. 309, 321. On appeal to the Exchequer Chamber no opinion was expressed on this point, the court being apparently divided.

⁵³ *Houldsworth v. City of Glasgow Bank* (1880) 5 App.Cas. 317. See Hornby. "*Houldsworth v. City of Glasgow Bank*" (1956) 19 M.L.R. 54.

⁵⁴ *Quartz Hill Gold Mining Co. v. Eyre* (1888) 11 Q.B.D. 674.

⁵⁵ *Irish People's Assurance Co. v. Dublin City Assurance Co.* [1929] I.R. 25,

⁵⁶ *D. & L. Caterers, Ltd. v. D'Ajou* [1945] K.B. 364.

⁵⁷ *Metropolitan Saloon Omnibus Co. v. Hawkins* (1859) 4 H. & N. 87. No doubt a non-trading corporation such as an Oxford college may also sue for a libel tending to its pecuniary damage.

members or agents of the corporation who have been defamed. So it has been held that a municipal corporation cannot sue for libel charging it with corruption and bribery in the administration of municipal affairs.⁵⁸

§ 178. Unincorporated Bodies

Trade Unions

Until 1901 it was generally agreed that a corporation and an individual or individuals were the only entities known to the common law who could sue or be sued. But in that year, in *Taff Vale Ry. v. Amalgamated Society of Railway Servants*⁵⁹ it was held by the House of Lords that a registered trade union, though not a corporate body, was a legal entity having sufficient of the characteristics of a juristic person to enable it to be sued in tort for the wrongful acts of its officials. One of the main reasons for this decision was that the Trade Union Acts of 1871 and 1876, by conferring upon trade unions many valuable rights in connection with the protection of their funds, had impliedly rendered them liable to be sued for torts committed by their officials acting upon their behalf. But it has since been provided by section 4 of the Trade Disputes Act, 1906, that "an action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union, in respect of any tortious act⁶⁰ alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court." The protection given is not confined to torts which are committed in contemplation or furtherance of a trade dispute,⁶¹ but on the other hand, a *quia timet* injunction may be obtained.⁶² Some have not found it easy to understand on what principle of justice these wealthy and powerful associations are thus raised above the law

⁵⁸ *Manchester (Mayor of) v. Williams* [1891] 1 Q.B. 94. Doubted in *Willis v. Brooks* [1947] 1 All E.R. 191.

⁵⁹ [1901] A.C. 426.

⁶⁰ Breaches of contract are not protected, so a member of a union who has been wrongly expelled from it may sue it under the principle of the *Taff Vale* case and recover damages out of the union funds: *Bonsor v. Musicians Union* [1956] A.C. 104.

⁶¹ *Vacher & Sons, Ltd. v. London Society of Compositors* [1913] A.C. 107. But note that the Act does not protect officials of a trade union from personal liability for wrongful acts: *Rookes v. Barnard* [1964] A.C. 1129. For the statutory definition of "workmen" and "trade dispute," see above, p. 527.

⁶² *Boulting Bros. v. A.C.T.A.T.* [1963] 2 Q.B. 606.

and exempted from all liability for their wrongful acts.⁶³ As a trade union is a legal entity it has the correlative right to sue in its registered name.⁶⁴

Other unincorporated entities

It is uncertain how far the principle in the *Taff Vale* case applies to the many heterogenous bodies known to English law. It has been held to cover a registered Friendly Society,⁶⁵ and a Trustee Savings Bank,⁶⁶ but not an ordinary members' club which is neither incorporated nor proprietary. In some cases it may be possible to prove that the actual wrongdoer was the servant or agent of a particular member or members (e.g., the committee⁶⁷); in other cases it may be possible to obtain a representation order under R.S.C., Ord. 15, r. 12, provided that the members whose names appear on the writ are persons who may fairly be taken to represent the body of club members, and that they and all the other club members have the same interest in the action.⁶⁸

§ 179. Minors⁶⁹

(1) Capacity to be sued

A minor is in general liable for his torts in the same manner and to the same extent as an adult. In certain other branches

⁶³ For an excellent account of the genesis of the Trade Disputes Act, see Clegg, Fox, and Thompson, *A History of British Trade Unionism* (Oxford, 1964), Vol. i, pp. 313-325. One of the factors was that the union in the *Taff Vale* case had been obliged to pay out £23,000 as damages for the torts of its officials committed during a strike, together with £42,000 in costs. Astbury J. in *National Sailors' and Firemen's Union v. Reed* [1926] Ch. 536, 539-540 held that the General Strike of 1926 was illegal. This pronouncement was powerfully criticised by Goodhart, "The Legality of the General Strike in England": *Essays*, p. 226. The Trade Disputes Act, 1927, which provided that a strike or lock-out was illegal if it had any object other than or in addition to the furtherance of a trade dispute within the trade or industry in which the strikers or employers locking out are engaged, and was a strike or lock-out designed or calculated to coerce the Government either directly or indirectly by inflicting hardship upon the community, has been repealed by the Trade Disputes and Trade Unions Act, 1946.

⁶⁴ *National Union of General & Municipal Workers v. Gillian* [1946] K.B. 81; *Willis v. Brooks* [1947] 1 All E.R. 191; *B. M. T. A. v. Salvadori* [1949] Ch. 556.

⁶⁵ *Longdon-Griffiths v. Smith* [1951] 1 K.B. 295.

⁶⁶ *Knight and Searle v. Dore* [1964] 2 Q.B. 631.

⁶⁷ As in *Brown v. Lewis* (1896) 12 T.L.R. 455 (members of committee of Blackburn Rovers Football Club personally liable for defective stand).

⁶⁸ *Campbell v. Thompson* [1953] 1 Q.B. 445; Lloyd, Note, 16 M.L.R. 359.

⁶⁹ See Bohlen, "Liability in Tort of Infants and Insane Persons" (1924) 23 Mich.L.Rev. 9; *Studies*, Chap. 11.

of the law liability is excluded by the fact that the defendant is below a certain age. Thus a child under eight years of age is exempt from all responsibility for crimes committed by him. A child between the ages of eight and 14 is presumed to be incapable of criminal intent, though this presumption may be rebutted by proof to the contrary. A person under the age of 21 is in general free from all liability for breach of contract. In the law of torts, however, there are no similar rules of exemption. Thus a child of any age may be sued for trespass.⁷⁰ or conversion, and will be held liable in damages just as if he were an adult.⁷¹ The youth of the defendant is not however in all cases wholly irrelevant. For it may be evidence of the absence of the particular mental state which is an essential element in the kind of tort in question. Thus, if an action is based on malice or on some special intent, the fact that the defendant is extremely young is relevant as tending to disprove the existence of any such malice or intent. Similarly, it would seem that in order to make a child liable for negligence, it must be proved that he failed to show the amount of care reasonably to be expected from a child of that age. It is not enough that an adult would have been guilty of negligence had he acted in the same way in the same circumstances. This, indeed, seems never to have been decided, but it would seem implied in the decisions on the contributory negligence of children.⁷² In general the principle appears to be that a minor who is incapable of forming a culpable intention or of realising the probable consequences of his conduct is relieved from liability in those cases in which fault is essential to liability, but that wherever a liability is imposed irrespective of fault he is fully liable as a normal adult.⁷³ It sometimes seems to be assumed that it is

⁷⁰ *O'Brien v. McNamee* [1953] I.R. 86 (child of seven liable in trespass for burning plaintiff's haystack). But recent cases hold that in trespass intention or negligence must be shown: see above, § 52. It was on this ground that the child defendant succeeded in *Walmsley v. Humenick* [1954] 2 D.L.R. 232.

⁷¹ This sentence was cited with approval by Clyde J. in *Walmsley v. Humenick* [1954] 2 D.L.R. 232, 239.

⁷² *Lynch v. Nurdin* (1841) 1 Q.B. 29; *Harrold v. Watney* [1898] 2 Q.B. 320; *Yachuk v. Oliver Blais, Ltd.* [1949] A.C. 386; *Liddle v. Yorkshire C. C.* [1984] 2 K.B. 101, 125. See also the law relating to infant entrants on premises, above, § 113.

⁷³ This sentence was cited in *Walmsley v. Humenick* [1954] 2 D.L.R. 232,

not worth while suing an infant in tort, because he may have no assets out of which to satisfy the judgment. Apart from the fact that this assumption may be untrue in the affluent society, it is worth remembering that a judgment debtor now without funds may acquire them later, and that he may be sued on the judgment, or execution may be issued on it, up to six years from its date, or even after that period with the leave of the court.⁷⁴

Tort and contract

When the act of a minor is both a tort and a breach of contract, is he liable for the tort, notwithstanding that the contract is not binding on him,⁷⁵ or does his exemption from an action for breach of contract protect him against an action for the tort also? Here the law has seen some development. By the middle of the seventeenth century it was settled that if an action against an infant was in truth founded on contract the plaintiff could not convert it into an action of tort lest "touts les infants in Angleterre serront ruine."⁷⁶ In the eighteenth century "Lord Mansfield, indeed, frequently said, that this protection was to be used as a shield, and not as a sword; therefore if an infant commit an assault, or utter slander, God forbid that he should not answer for it."⁷⁷ But the courts still would not permit the plaintiff to sue in tort for what was in truth a breach of contract. So in *Jennings v. Rundall*⁷⁸ the infant defendant was held not liable for riding too hard a mare which he had hired from the plaintiff. But in 1868 "a far stronger and more learned court"⁷⁹ made the distinction, which is now accepted law, between acts which were merely wrongful modes of performing the contract and acts which were outside the contract

⁷⁴ R.S.C., Ord. 42, rr. 23-24.

⁷⁵ It will be recalled that the Infants Relief Act, 1874, s. 1, provides that contracts with infants for goods supplied or to be supplied, other than necessities, are "absolutely void."

⁷⁶ *Johnson v. Pye* (1665) 1 Sid. 258. The garbled Law-French of Restoration reports is a well-known oddity. In the collateral report in 1 Keb. 905 Sir John Keeling C.J. is reported to have said that if the action were allowed "the whole foundation of the common law will be shaken."

⁷⁷ *Jennings v. Rundall* (1799) 8 T.R. 335, at 336-337, *per* Lord Kenyon C.J. ("Where Lord Mansfield led, Lord Kenyon C.J. followed, though he was not a judge who followed blindly": *Government of India v. Taylor* [1955] A.C. 591, at 605, *per* Viscount Simonds.)

⁷⁸ (1799) 8 T.R. 335.

⁷⁹ Pollock, *Revised Reports*, iv, 5. Pollock thought *Jennings v. Rundall* "perhaps not adequately argued." But the decision on the facts seems quite correct. There was no express agreement not to override the mare.

altogether. In *Burnard v. Haggis*⁸⁰ the defendant, an undergraduate of Trinity College, Cambridge, under the age of twenty-one, hired a mare for riding, and in breach of an express term in his agreement he used her for jumping and so injured her. It was held that the defendant was liable in tort, notwithstanding the fact that it was at the same time the breach of a void contract. So if an infant bailee refuses to redeliver the chattel bailed, contrary to an express term of the contract of bailment, he can be sued for conversion or in detinue.⁸¹ In such a case the infant has gone outside the four corners of the contract, or to put it in another way, has committed a breach of a fundamental term of the contract which determines the bailment and constitutes an independent trespass.⁸² But it is well settled that the courts will not allow a plaintiff to enforce a void contract in a roundabout way by framing his action in tort. So if a minor purchases goods, and retains them in his possession while refusing to pay for them, he cannot be sued in detinue. In such a case the property in the goods passes to the infant by delivery. The contract, though void, is sufficiently recognised at law to constitute a *causa* for the transfer of property just as *donatio* was one *causa* for the passing of property by *traditio* under Roman law,⁸³ so that the infant can give a good title to a third party to whom he sells the non-necessary goods which he has obtained under a void contract.⁸⁴

Restitution in equity

There is, however, an important exception to the rule that a minor is liable for his torts. He is not liable in tort for procuring a contract by means of fraudulent representations either as to his age or as to any other matter. If a minor fraudulently pretends to be of full age, whereby the plaintiff is induced to contract with him, the contract is not for that reason binding on the minor, nor is he estopped from pleading his infancy.⁸⁵

⁸⁰ (1868) 14 C.B.(N.S.) 45 (Erle C.J., Willes, Byles and Keating JJ. Lord Halsbury (1823-1921), who knew all the great judges of the Victorian era, used to say (*ut audiui*) that Sir William Erle was the greatest).

⁸¹ *Ballett v. Mingay* [1948] K.B. 281.

⁸² Compare the cases on exemption clauses, above, § 8.

⁸³ *R. Leslie, Ltd. v. Sheill* [1914] 3 K.B. 607, 613, 627; *Stocks v. Wilson* [1913] 2 K.B. 235, 246.

⁸⁴ *Hall v. Wells* [1962] Tas.S.R. 122.

⁸⁵ *Levene v. Brougham* (1909) 25 T.L.R. 265.

Neither can the plaintiff sue in tort for the deceit. This was clearly established by the Court of Appeal in *R. Leslie, Ltd. v. Sheill*.⁸⁶ "At the time of the transaction in question," said Lord Sumner,⁸⁷ "the appellant was an infant. He succeeded in deceiving some money-lenders by telling them a lie about his age, and so got them to lend him £400 on the faith of his being adult. Perhaps they were simpler than money-lenders usually are: perhaps the infant looked unusually mature. At any rate, when they awoke to the fact that they could not enforce their bargain and sought to recover the £400 paid, charging him with fraud, the jury found that the appellant had been guilty of fraud, and he does not now complain of the verdict. . . . It is not a pretty story to begin life with, and one might have expected that the appellant's chief anxiety would have been to live it down, but money is money, and I suppose that £400 is more than he cares to pay, or rather to repay, if he can avoid it." The court allowed the infant's appeal. Although a minor who procures a contract by a fraudulent representation that he is of age is not liable either on the contract or in tort, he is nevertheless subject to an equitable obligation of somewhat undefined extent to restore any property or other advantage thereby obtained by him.⁸⁸

Parents not responsible for their children's torts ⁸⁹

A father ⁹⁰ is not as such liable for the torts of his children, even while they are under age and living in his house.⁹¹ It is to be observed, however, that a child may be his father's servant, so as to bring the father within the rule as to employers' liability. If a father sends his son on an errand with a motor-car, he will answer for his son's negligence in driving; but he will answer for him, not as being his father, but as being his

⁸⁶ [1914] 3 K.B. 607.

⁸⁷ [1914] 3 K.B. 607, at 611.

⁸⁸ *R. Leslie, Ltd. v. Sheill* [1914] 3 K.B. 607. It seems impossible to reconcile with this decision some of the dicta of Lush J. in *Stocks v. Wilson* [1918] 2 K.B. 235. The decision on the facts in the latter case, however, seems to be correct.

⁸⁹ Waller, "Visiting the Sins of the Children" (1963) 4 M.U.L.R. 17.

⁹⁰ Presumably the same rule applies to a mother (or indeed any person *in loco parentis*) in the absence of a father.

⁹¹ Although the law permits him to sue third parties for interference with such a relationship: see above, § 145.

employer.⁹² Secondly, a father may be liable for his own personal negligence in affording or allowing his child an opportunity of doing mischief. So in *Bebbee v. Sales*⁹³ a father supplied his son, 15 years of age, with an air-gun and allowed him to remain in possession of it after warning and complaint of mischief done thereby. Thereafter the boy accidentally wounded the plaintiff by discharging the gun, and the father was held liable for his own negligence in thus supplying his son with the means of mischief. Now the plaintiff in such a case would be in a stronger position, for the Air Guns and Shot Guns Act, 1962, section 1, makes it a criminal offence to give an air weapon to a person under 14 years, or for him to accept it. It also places severe restrictions upon the use or possession of air weapons by young persons except under supervision. Breach of these provisions might give rise to an action for breach of statutory duty,⁹⁴ and could always be relied upon as evidence of negligence. In any event, it will not necessarily be a defence to plead that the child was warned to be careful, for everyone knows that even well-behaved children sometimes disobey their parents' warnings.⁹⁵ In some American cases⁹⁶ parents have been held liable for assaults committed by children known to have the habit of attacking people: this "vicious child" doctrine has not yet been applied in England, though a reasonably prudent parent should take steps to prevent small children escaping on to the highway, and injuring users of it.⁹⁷

(2) Capacity to sue

Apart from the procedural rule that he must sue by his next friend⁹⁸ an infant is in this respect no different from an adult. It has even been decided that an infant may sue its own parent for negligence.⁹⁹

⁹² *Gibson v. O'Keeney* [1928] N.I. 66.

⁹³ (1916) 82 T.L.R. 418. See also *Sulliran v. Creed* [1904] 2 I.R. 317; *Donaldson v. McNiven* [1952] 2 All E.R. 691; *Hatfield v. Pearson* (1957) 6 D.L.R. (2d) 593.

⁹⁴ See above, Chap. 11.

⁹⁵ *Newton v. Edgerley* [1959] 1 W.L.R. 1031.

⁹⁶ *Bieker v. Owens* (1961) 850 S.W. 2d 522.

⁹⁷ *Carmarthenshire County Council v. Lewis* [1955] A.C. 549.

⁹⁸ Usually his parent: O. 80, r. 2.

⁹⁹ *Deziel v. Deziel* [1953] 1 D.L.R. 651. The real defendant in such a case will invariably be an insurance company.

Pre-natal injuries

No English authority decides whether damages can be recovered for injuries inflicted before birth. It was held in *Walker v. Great Northern Ry. of Ireland*¹ that the plaintiff had no cause of action where her mother, while the plaintiff was *en ventre sa mère*, had been a passenger on the railway of the defendants, and was there injured in a collision caused by the defendants' negligence, and the plaintiff was subsequently and consequently born deformed. The decision, however, proceeded on the ground that the defendants owed no duty of care to a person of whose existence and presence they were unaware. In a later case² the Supreme Court of Canada in very similar circumstances granted a remedy. There is no reason in principle why an existing but unborn child should be deprived of the protection of the law against wilful or negligent injuries inflicted upon it.³ It is submitted that the real question is: Has a living plaintiff a right not to have been injured by acts done before his birth? Once such acts have been established to be tortious there seems no reason why this head of damage should not be recognised, whether the wrong be done to his person, his reputation or his property.⁴

§ 180. Insanity⁵

There is not much English authority as to the liability of insane persons for their torts. On principle, however, we may say with some confidence that insanity is not in itself any ground of exemption. The object of the law of torts is compensation and not punishment,⁶ so there is nothing illogical in holding an insane person civilly responsible. Still insanity may be relevant, for, like infancy, it operates (if at all) as evidence that the mental state requisite to create liability is not present. It is

¹ (1891) 28 L.R.(Ir.) 69.

² *Montreal Tramways v. Leveille* [1933] 4 D.L.R. 337.

³ Cf. Lord Macmillan in *Elliot v. Joicey* [1935] A.C. 209, 238-241.

⁴ Winfield, "The Unborn Child" (1942) 8 Camb.L.J. 76; 4 Toronto L.J. 278; Anon. (1963) 113 L.J. (N.) 100.

⁵ The English authorities as to the liability of persons of unsound mind for torts are fully surveyed in Fridman, "Mental Incompetency" (1963) 79 L.Q.R. 502, (1964) 80 L.Q.R. 84. See also *Williams v. Williams* [1964] A.C. 698 (insanity no defence to charge of cruelty).

⁶ *White v. White* [1950] P. 39, 58. See above, § 7.

probable that the M'Naughten Rules⁷ do not provide the test of insanity for the civil as distinct from the criminal law.⁸ In any event, it is necessary to distinguish between different species of wrongs:

(1) In wrongs based on malice or on some specific intent, like malicious prosecution, malicious libel on a privileged occasion, or deceit, insanity may be a good defence as disproving the existence of any such malice or intent.

(2) In wrongs of voluntary interference with the person, property, reputation, or other rights of other persons, such as trespass, assault, conversion, or defamation, it is no defence that the defendant was under an insane delusion as to the existence of a sufficient legal justification. If he knew the nature and quality of his act it is no defence that he did not know that what he was doing was wrong, whatever the position may be in the criminal law.⁹ An insane person, therefore, who converts another's property to his own use under the delusion that it is his own, or who publishes a defamatory statement under the belief that it is true, is just as liable as if he were sane.¹⁰ If, however, the insanity of the defendant is of so extreme a type as to preclude any genuine intention to do the act complained of, there is no voluntary act at all, and therefore no liability.¹¹ Mischief done by an epileptic in one of his paroxysms, or by a fever patient in his delirium, or by a somnambulist in his sleep is presumably not actionable.¹²

(8) In wrongs of strict liability there is no reason why insanity should be any defence, unless it is of so extreme a nature as to deprive the act of its voluntary quality.

(4) In wrongs dependent upon negligence the conduct of the defendant must be judged by reference to his knowledge or means of knowledge. Insanity, therefore, may be relevant as evidence

⁷ (1843) 10 Cl. & F. 200.

⁸ *Williams v. Williams* [1964] A.C. 698.

⁹ *Morris v. Marsden* [1952] 1 All E.R. 925 (person of unsound mind liable for assault and battery), cited with apparent approval by Lord Pearce in *Williams v. Williams* [1964] A.C. 698, 751. Similar cases are *Donaghy v. Brennan* (1900) 19 N.Z.L.R. 289; *Phillips v. Soloway* (1957) 6 D.L.R. (2d) 570; *Adamson v. Motor Vehicle Trust* (1957) 58 W.A.L.R. 56.

¹⁰ *Vaughan v. Ford*, 1953 (4) S.A. 486 (anonymous letters sent by a person with emotional instability of child of 8).

¹¹ This sentence was approved in *Tindale v. Tindale* [1950] 4 D.L.R. 363.

¹² *Morris v. Marsden* [1952] 1 All E.R. 925, 927.

that the necessary knowledge or means of knowledge did not exist. It has been held that insanity is no defence to an action for negligence in operating a motor-vehicle.¹³

§ 181. Married Persons

(1) Actions between spouses

Since August 1, 1962 each of the parties to a marriage¹⁴ has had the like right of action in tort against the other as if they were not married. This change was effected by section 1 of the Law Reform (Husband and Wife) Act, 1962, in consequence of the recommendations of the Law Reform Committee.¹⁵ The only restriction is that when an action in tort is brought by one party to the marriage against the other party during the subsistence of the marriage the court may stay the action if (a) it appears that no substantial benefit¹⁶ would accrue to either party from a continuance of the proceedings, or (b) the question could be more conveniently disposed of under section 17 of the Married Women's Property Act, 1882.

Disputes as to property

Special provision is made by the Married Women's Property Act, 1882, section 17, for the settlement of disputes between husband and wife as to the ownership or possession of property. A judge of the High Court or of the county court is empowered, on application by summons, to make in such a case such an order as he thinks just. This summary remedy in lieu of action is

¹³ *Adamson v. Motor Vehicle Trust* (1957) 58 W.A.L.R. 56.

¹⁴ This includes parties to a marriage which has been dissolved.

¹⁵ Ninth Report (1961, Cmnd. 1268), which cited with approval a paragraph in the 13th edition (p. 89). Actions between spouses were once thought to be unseemly and undesirable, but the modern practice of insurance (compulsory in some cases) has had its effect on some traditional ideas, as the following comment shows: "The growth of liability insurance has to a great extent changed the effect of a law-suit between relatives, or even friends, from the traditional friction to the closest sort of amicable co-operation. Nothing draws two people together like a mutual desire to get something out of one's insurance carrier": Larson, "A Problem in Contribution" (1940) 4 Wis.L.Rev. 467, 499.

¹⁶ On Second Reading in the House of Lords the Government spokesman said this phrase was intended to mean benefit of financial value to the parties, and not that it should include ethical or moral values: 241 H.L. Deb., 5s., col. 1104 (Viscount Colville of Culross).

available both for the husband and the wife.¹⁷ It was once held that a deserted wife who remains in occupation of the matrimonial home pending the hearing of the suit¹⁸ cannot be turned out¹⁹ except under such an order,²⁰ and the cases show that the courts were very slow to make one.²¹

These cases were criticised by property lawyers on the ground that they introduced a novel and uncertain right into the field of proprietary interests, and confused the distinction between a licence or an equity, which is a mere personal right, and an estate or equitable interest which is, or may be, binding on third parties. The cases were defended by family lawyers on the ground that there was a social necessity to protect the deserted wife in an age of housing shortage. In *National Provincial Bank, Ltd. v. Ainsworth*²² a unanimous House of Lords favoured the property lawyers and abolished the deserted wife's licence or equity to remain in the matrimonial home. The House held that a wife was not the licensee of her husband in the matrimonial home which was his property: her rights were simply incident to her status as a wife. These were rights of a personal nature enforceable against the husband alone, and not against third parties such as a purchaser or mortgagee. The wife's rights had not the quality of being able to endure through different ownerships of the land according to the normal conceptions of real property. It followed that the wife's right was not, as had once been held,²³ an overriding interest within section 70 of the Land Registration Act, 1925.

¹⁷ *Phillips v. Phillips* (1888) 13 P.D. 220. The procedure under s. 17 is not the only way in which a dispute between husband and wife may be determined. It may be settled in interpleader proceedings in which they are claimants: *De la Rue v. Hernu* [1936] 2 K.B. 164.

¹⁸ *Montgomery v. Montgomery* [1964] 2 W.L.R. 1086.

¹⁹ But it does not follow that she can turn her husband out or refuse him admission: *Bendall v. McWhirter* [1952] 2 Q.B. 466, 477. But an injunction may be granted to restrain the husband from entering pending the hearing of a petition lest pressure be put on the wife to abandon her petition: *Silverstone v. Silverstone* [1958] P. 174 (where the grounds of the petition were cruelty and adultery and not desertion).

²⁰ *Errington v. Errington* [1952] 1 K.B. 290; *Bendall v. McWhirter* [1952] 2 Q.B. 466.

²¹ Thus an order has been made under s. 17 restraining the husband from selling the home over the wife's head until he had provided suitable alternative accommodation: *Lee v. Lee* [1952] 2 Q.B. 489.

²² [1965] 2 All E.R. 472.

²³ See above, p. 120, n. 8.

The decision in *National Provincial Bank v. Ainsworth* puts an end, for the moment, to a controversial issue. It is perhaps worth noting that the practical importance of the decision may be over-estimated. It is probable that most deserted wives are in premises controlled by the Rent Restriction Acts. If so, it has been settled since 1944²⁴⁻³² that the husband cannot put an end to his tenancy so long as the wife remains on the premises.

But two of the Law Lords in *National Provincial Bank v. Ainsworth* thought that the law relating to deserted wives and third parties was in an unsatisfactory state. It is possible that amending legislation will be introduced.

(2) Liability of a wife to third persons

Since the Law Reform (Married Women and Tortfeasors) Act, 1935, section 1, a married woman may be sued for her torts, and is subject to the law relating to bankruptcy and to the enforcement of judgments and orders in all respects as if she were a *feme sole*. Before that Act any damages recovered against her could be levied only out of her separate property not restrained from anticipation and she could not be made bankrupt unless she was carrying on a separate trade.

(3) Liability of a husband for his wife's torts

The Act of 1935 made a still bigger change in the position of the husband. At common law a husband was liable to be joined with his wife in all actions for torts committed by her during the subsistence of the marriage and the House of Lords decided³³ that this liability had not been taken away by the Married Women's Property Act, 1882. But as the Act of 1882 had deprived the husband of all his interest *jure mariti* in his wife's separate property and earnings out of which he might have satisfied a claim for his wife's wrong-doing it became his hard fate to continue to bear the burden of his wife's wrong-doings when he had been relieved of the means which would have assisted him to bear it.³⁴ This injustice has now been remedied.

²⁴⁻³² *Brown v. Draper* [1944] K.B. 309, expressly approved by Lord Wilberforce in *National Provincial Bank v. Ainsworth* [1965] 2 All E.R. 472, 497.

³³ *Edwards v. Porter* [1925] A.C. 1.

³⁴ In *Newton v. Hardy* (1933) 149 L.T. 165 the plaintiff recovered damages for the enticement of her husband by the wife of the defendant, who was himself entirely innocent.

Under the Act of 1935³⁵ the husband of a married woman is not, by reason only of his being her husband,³⁶ liable in respect of any tort committed by her whether before or after the marriage, or to be sued or made a party to any proceeding brought in respect of any such tort. Section 4 (2) (c) also provides that nothing in the Act "prevents a husband and wife from rendering themselves, or being rendered, jointly liable in respect of any tort, contract, debt, or obligation, and of suing and being sued either in tort or in contract or otherwise, in like manner as if they were not married." It has been argued that this provision enables a husband and wife to be sued for conspiracy,³⁷ but this argument rests on the doubtful assumption that the bar to suit under the old law was merely procedural.³⁸

§ 182. Convicts

Criminals, even when undergoing imprisonment, have the same rights of action for torts as a man with a blameless life.³⁹ Those who break the law remain the Queen's subjects—they are not her enemies.⁴⁰

§ 183. Bankrupts

(1) Liability

A bankrupt is in no special position as regards torts committed by him, whether before or during the bankruptcy. The Bankruptcy Act, 1914,⁴¹ provides that demands in the nature of

³⁵ s. 3.

³⁶ So he will be liable where he has authorised the tort on the general principle of liability for an agent: *Barber v. Pigden* [1937] 1 K.B. 664.

³⁷ *Auten v. Rayner* (1960) *The Times*, March 15.

³⁸ See *Tooth & Co. Ltd. v. Tillyer* (1956) 95 C.L.R. 605, 615.

³⁹ This seems to be the effect of the Criminal Justice Act, 1948, s. 70, which amended the Forfeiture Act, 1870. Yet the Prison Commissioners hold themselves "free to decide on the merits of each case whether a prisoner should be allowed to initiate legal proceedings, or to seek legal advice to that end": Fox, *The English Prison and Borstal Systems* (London, 1952), p. 220. In practice it seems that permission to proceed (even against the Crown or the Commissioners themselves) is always given in genuine cases: *Ellis v. Home Office* [1953] 2 Q.B. 135.

⁴⁰ *Gibbons v. Duffell* (1932) 47 C.L.R. 520, 535.

⁴¹ s. 30 (1).

unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable against the trustee in bankruptcy. The bankrupt remains liable to be sued. But if the demand arises from a contract it is not the less provable against the trustee because it might also be framed in tort, as where a passenger on a tram was injured owing to the negligence of the driver.⁴² And under the Law Reform (Miscellaneous Provisions) Act, 1934,⁴³ where the plaintiff has a right of action in tort against the estate of a deceased wrongdoer, and that estate is insolvent, he may prove in the administration of the estate for unliquidated damages.

(2) Power to sue

Where a right of action exists for a tort committed against the bankrupt a distinction is taken. A right of action in respect of a tort which results in injuries exclusively to the person of the bankrupt does not pass to the trustee.⁴⁴ On the other hand, a right of action which results in injuries exclusively to the estate of the bankrupt passes to the trustee. Where the tort results in injuries both to the estate and also to the person of the bankrupt, the right of action for the tort, in so far as it results in injuries⁴⁵ to the estate, will pass to the trustee: in so far as it results in injuries to the person of the bankrupt, it will remain in him. In such a case the trustee and bankrupt can either bring separate actions or join as plaintiffs in one action in which case the damages will be assessed under two separate heads.⁴⁶

§ 184. Executors and Administrators

The question whether a cause of action survives the death of the person injured must be carefully distinguished from the question whether the act of causing the death of a person gives any right of action for damages to his relatives. The former question is that which is considered in this section: the latter

⁴² *Re Great Orme Tramways Co.* (1934) 50 T.L.R. 450.

⁴³ s. 1 (6).

⁴⁴ *Beckham v. Drake* (1849) 2 H.L.C. 579. In such a case the bankrupt may spend the damages, if he recovers any, in the maintenance of himself and his family: *Ex p. Vine* (1878) 8 Ch.D. 364.

⁴⁵ *Ross v. Buckett* [1901] 2 K.B. 449.

⁴⁶ *Wilson v. United Counties Bank* [1920] A.C. 102.

will be dealt with later in connection with the provisions of the Fatal Accidents Acts.⁴⁷

Actio personalis moritur cum persona

Until 1934, subject to important exceptions, no executor or administrator could sue or be sued for any tort committed against or by the deceased in his lifetime. This was the purport of the maxim of the common law *Actio personalis moritur cum persona*—a personal action dies with the parties to the cause of action.⁴⁸ An action for a tort had to be begun in the joint lifetime of the wrongdoer and the person injured. If, after it had been so begun, either of the parties died before a verdict had been obtained, the action abated, and could not be continued or recommenced by or against the representatives of the deceased. This rule, however, had been to a very large extent eaten away by exceptions. Their effect was, speaking generally, to abolish the rule so far as it related to injuries to property, but to leave it in full operation with respect to injuries of other kinds.

But sweeping changes were made in the previous law by the Law Reform (Miscellaneous Provisions) Act, 1934.⁴⁹ Before that Act it was often said to be cheaper to kill than to maim or cripple.⁵⁰ This defect in the law became particularly noticeable with the growth of motor traffic. A person injured in a collision due to the negligence of another might (even after the Road Traffic Act, 1930, had made it compulsory to insure against third-party risks) find himself left without remedy because the negligent party had himself been killed in the accident. The Act states as the general rule that in future on the death⁵¹ of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. But

⁴⁷ Below, § 221.

⁴⁸ See Goudy in *Essays in Legal History*, pp. 215–232; the Interim Report of the Law Revision Committee, 1934 (Cmd. 4540); Holdsworth, H.E.L., iii, pp. 576–583.

⁴⁹ See the interesting account of the genesis of the Act by the First Parliamentary Counsel (Sir Noël Hutton) in “Mechanics of Law Reform” (1961) 24 M.L.R. 18.

⁵⁰ But see Pollock, *Torts*, p. 53, n. 80 and *H. West & Son, Ltd. v. Shephard* [1964] A.C. 307, 342, for criticism of this statement.

⁵¹ This includes suicide: *Pigney v. Pointers Transport Services* [1957] 1 W.L.R. 1191.

to the general rule there are certain exceptions. There is no survival of causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other, or of claims for damages on the ground of adultery.⁵² The Act does not, however, abolish the common law rule that it is no tort to cause the death of another. It does not make the infliction of death into a new tort: death is only the event which is required to enable an existing cause of action to descend to the personal representatives. It is necessary to emphasise this, because in *Rose v. Ford*⁵³ the House of Lords held that a right of action for damages for loss of expectation of life survived to the personal representative. A living person can claim damages for such loss. The right is vested in him in life and on his death passes to his personal representative who stands in his shoes. The fact that the expectation is realised, i.e., that the death comes at the time anticipated or sooner, cannot make any difference. The cause of action is not the death but the negligence which caused it, and even if there is only a split second between that act of negligence and the death—and, it would seem, even if the death is instantaneous—the action will descend to the personal representative.⁵⁴

Limitation of actions

(1) *Death of injured party*

The ordinary six- or three-year period applies.⁵⁵ It runs from the accrual of the cause of action as if no death had occurred.

But if the deceased could have applied to the court under the Limitation Act, 1968, section 1,⁵⁶ for leave to bring the action out of time on the ground that he was ignorant of material facts of a decisive character relating to the cause of action, then his estate will have a similar right. Section 3 of the 1968 Act provides that the personal representatives must bring the action either within twelve months of the date when the deceased first

⁵² s. 1 (1). It is not clear why this should be so. Defamation may cause much more harm to the next-of-kin than an assault. The reason given by the Law Revision Committee, 1934 (Cmd. 4540, p. 7) that "the presence of the plaintiff or of the defendant may be of the greatest importance" is unconvincing. Nor is it clear whether "seduction" is used in its narrower popular sense or in its wider legal meaning covering all enticement of a servant. See Pollock, *Torts*, p. 52, n. 29.

⁵³ [1937] A.C. 826.

⁵⁴ *Morgan v. Scoulding* [1938] 1 K.B. 786.

⁵⁵ See below, § 225.

⁵⁶ For which, see below, § 224.

knew, or could have become aware of, the relevant facts, or within twelve months of the death.

(2) *Death of wrongdoer*

No proceedings in respect of a cause of action in tort can be taken against the estate of a deceased person unless *either* the proceedings were pending at the date of his death *or* the proceedings are taken not later than six months after his personal representatives took out representation.⁵⁷ Representation must therefore be taken out before the action is commenced unless the proceedings were pending at the date of death. If the person entitled to represent the estate refuses to take out letters of administration the court may appoint as administrator a nominee of a person who wishes to take proceedings against the estate.⁵⁸

The relationship of these provisions to the general period of limitation for actions in tort (three years for personal injuries, six years for other claims⁵⁹) is obscure. It has been said that these provisions exclude the general limitation period, so that when proceedings are not pending at the date of death the only period of limitation is the period of six months from the date of the grant of representation.⁶⁰ But this would have the bizarre result that an action which had become statute-barred in the defendant's lifetime would be revived for six months after probate. It is hard to see how an action which has become statute-barred in a man's lifetime can be said to be "subsisting against him" at the date of his death within the meaning of section 1 (1).⁶¹ The better view is that section 1 (3) is complementary to and not exclusive of the general limitation period.⁶²

Where the cause of action, as in the case of disturbance of the right of support, does not arise until the damage has been

⁵⁷ s. 1 (3). The Law Reform (Limitation of Actions) Act, 1954, ss. 4, 8 (3), and Sched., repealed the former additional requirement of the 1934 Act that the cause of action must have arisen not earlier than six months before the death of the wrongdoer. This provision remains familiar to all who have read what is, perhaps, the best of all detective stories with a legal setting Cyril Hare's *Tragedy at Law*.

⁵⁸ *In the Estate of Simpson* [1936] P. 40.

⁵⁹ See below, § 225.

⁶⁰ *Airey v. Airey* [1958] 1 W.L.R. 729 (Diplock J.). The point was expressly left open by the C.A.: [1958] 2 Q.B. 300, 315.

⁶¹ See Chapman, *Statutes*, p. 7.

⁶² See Ison, Note, 21 M.L.R. 558.

suffered, the Act of 1984 expressly provides⁶³ that if the wrongdoer dies before or at the same time as the damage is suffered, there shall be deemed to be subsisting against him such cause of action as would have subsisted if he had died after the damage was suffered. The beneficent intentions of this provision will be defeated by section 1 (3) if the damage is suffered more than six months after his personal representative has taken out representation.⁶⁴

§ 185. Proceedings against Joint and Several Tortfeasors⁶⁵

(1) Who are joint tortfeasors

Where the same damage is caused to a person by two or more wrongdoers those wrongdoers may be either joint or independent tortfeasors. Persons are to be deemed joint tortfeasors within the meaning of this rule whenever they are responsible for the same tort—that is to say, whenever the law for any reason imputes the commission of the same wrongful act to two or more persons at once. This happens in at least three classes of cases—namely, agency,⁶⁶ vicarious liability,⁶⁷ and common action, i.e., where a tort is committed in the course of a common action, a “joint act done in pursuance of a concerted purpose.”⁶⁸ For example, in *Brooke v. Bool*⁶⁹ the defendant, accompanied by one Morris, entered premises occupied by the plaintiff in order to search for an escape of gas. The defendant examined a gas pipe with a naked light; Morris followed his example, and the resultant explosion damaged the premises. The defendant was held responsible for the acts of Morris. In order to be joint tortfeasors they must, in fact or in law, have committed the same wrongful act. “There must be a concurrence in the act or acts causing damage, not

⁶³ s. 1 (4). “Damage” in this subsection means injury: *Post Office v. Official Solicitor* [1951] 1 All E.R. 522.

⁶⁴ Unless it is not an action founded in tort: *Att.-Gen. v. Canter* [1939] 1 K.B. 818; *Post Office v. Official Solicitor* [1951] 1 All E.R. 522.

⁶⁵ The leading work is Williams, *Joint Torts and Contributory Negligence*.

⁶⁶ See below. § 188.

⁶⁷ See below, § 190. A master is always treated as a joint tortfeasor with the servant for whom he is vicariously liable (*Jones v. Manchester Corporation* [1952] 2 Q.B. 852, 870), although it is difficult to see why this should be so: *Semtex Ltd. v. Gladstone* [1954] 1 W.L.R. 945, 949; *Treacy v. Robinson & Son* [1937] I.R. 255, 266.

⁶⁸ *Brooke v. Bool* [1928] 2 K.B. 578, at 585.

⁶⁹ [1928] 2 K.B. 578.

merely a coincidence of separate acts which by their conjoined effect cause damage.”⁷⁰ The *injuria* as well as the *damnum* must be the same.⁷¹ But there are many cases in which the same damage is caused by independent and separate wrongful acts of several persons, as where a plaintiff sustains a single damage from the combined negligence of two motor-car drivers, who are not engaged in a common design (*e.g.*, racing on the road).⁷²

(2) Nature of liability

“If a number of persons jointly participate in the commission of a tort, each is responsible, jointly with each and all of the others, and also severally, for the whole amount of the damage caused by the tort, irrespective of the extent of his participation.”⁷³ That is to say, the person injured may sue any one of them separately for the full amount of the loss; or he may sue all of them jointly in the same action, and even in this latter case the judgment so obtained against all of them may be executed in full against any one of them. If the tortfeasors were independent or separate “the person damnified might sue them one by one and recover from one alone or from such as he chose to execute judgment against, provided that he did not recover more than the greatest sum awarded or, against any defendant, more than was awarded in the action against him.”⁷⁴ In the next section we shall consider how far there is any right of contribution or indemnity between the tortfeasors.

(3) Effect of judgment

At common law a judgment obtained against one joint wrongdoer released all the others, even though it was not satisfied. The tort was merged in the judgment.⁷⁵ This rule was abolished by the Law Reform (Married Women and Tortfeasors) Act, 1935,⁷⁶ which provides that where damage is suffered by any

⁷⁰ *The Koursk* [1924] P. 140, at 159, *per* Sargant L.J.

⁷¹ *Ibid.*, at 156, *per* Scrutton L.J.

⁷² *The Koursk* [1924] P. 140; *Drinkwater v. Kimber* [1952] 2 Q.B. 281, 292.

⁷³ *Dougherty v. Chandler* (1946) 46 S.R. (N.S.W.) 370, at 375, *per* Jordan C.J.

⁷⁴ *Wimpey (George) & Co., Ltd. v. British Overseas Airways Corporation* [1955] A.C. 169, at 181, *per* Lord Porter.

⁷⁵ *Brinsmead v. Harrison* (1871) L.R. 7 C.P. 547. The rule never applied to independent tortfeasors.

⁷⁶ s. 6 (1) (a).

person as the result of a tort, judgment recovered⁷⁷ against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage. "The language is curious. It contemplates the possibility of an action by an injured party against a person liable as a joint tortfeasor and at the same time regards him as having been sued by the injured party in a hypothetical action in the past."⁷⁸ It is not very clear whether this hypothetical action is tied to the point of time at which the cause of action arose or to the date of the commencement of the action against the tortfeasor first sued, or to no definite moment at all.⁷⁹ The Act of 1935 also provides⁸⁰ that if more than one action is brought in respect of the same damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the dependants⁸¹ of that person against tortfeasors liable in respect of the damage⁸² (whether as joint tortfeasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given,⁸³ and that the plaintiff shall not be entitled to costs in any of those actions except that in which judgment is first given,⁸⁴ unless the court is of opinion that there was reasonable ground for bringing the action.

(4) Release

The release of one joint wrongdoer releases all the others, even though this was not the intention of the parties, the reason being that the cause of action, which is one and indivisible, having

⁷⁷ So that if there is a release of one tortfeasor there is apparently no right of action against the other or others. *Aliter* in cases of contribution between tortfeasors; below § 186.

⁷⁸ *Wimpey (George) & Co. Ltd. v. B.O.A.C.* [1955] A.C. 188, at 194, *per* Lord Keith of Avonholm.

⁷⁹ See below, § 186.

⁸⁰ s. 6 (1) (b). Full discussion in Williams, *Joint Torts*, pp. 39-43.

⁸¹ This means the persons for whose benefit actions may be brought under the Fatal Accidents Acts, 1846 to 1959: Fatal Accidents Act, 1959, s. 1 (4).

⁸² "Liable" here cannot mean "held liable": it can only mean that a cause of action exists: *Wimpey (George) & Co., Ltd. v. B.O.A.C.* [1955] A.C. 188, 195.

⁸³ "Judgment first given" shall, where that judgment is reversed on appeal, be construed to refer to the judgment first given which is not so reversed: and where a judgment is varied on appeal it shall be construed to refer to the judgment so varied: s. 6 (3) (b).

⁸⁴ See s. 6 (3) (b).

been released, all persons otherwise liable thereto are consequently released.⁸⁵ This rule is equally applicable to a release under seal and to a release by way of accord and satisfaction.⁸⁶ A mere covenant or other agreement not to sue one of the joint wrongdoers must, however, be distinguished from an actual release given to him, whether by deed or by accord and satisfaction. An agreement not to sue does not, like a release, destroy the cause of action, but merely prevents it from being enforced against the particular wrongdoer with whom the agreement was made.⁸⁷ The distinction is technical but well-established.⁸⁸

§ 186. Contribution between Tortfeasors

“How some rules of law arose is not always known. For instance, except for the fact that in 1799 Lord Kenyon C.J. laid it down categorically in *Merryweather v. Nixan*⁸⁹ that there was no contribution between joint tortfeasors, no one has ever discovered whence the rule came, but it remained the law till abrogated by the Law Reform (Married Women and Tortfeasors) Act, 1935.”⁹⁰ That Act provides⁹¹ that where damage is suffered by any person as a result of a tort (whether a crime or not), any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise.⁹² The section thus provides for two cases—the normal one in which the plaintiff sues the two (or

⁸⁵ *Duck v. Mayeu* [1892] 2 Q.B. 511, 513. It has been suggested (Foster, “Law Revision” (1938) 2 M.L.R. 14, 20) that the principle upon which this rule is founded having been repudiated by the abolition of the rule in *Brinsmead v. Harrison*, this rule should also go. But the Act specifically makes a judgment a condition precedent to the right of contribution.

⁸⁶ *Thurman v. Wild* (1840) 11 A. & E. 453.

⁸⁷ *Duck v. Mayeu* 1892] 2 Q.B. 511. A transaction which is in form an actual release, whether by deed or by accord and satisfaction, will be construed as being merely an agreement not to sue, if it contains an express reservation of the right to proceed against the other wrongdoers. For this reservation would otherwise be wholly ineffective.

⁸⁸ *Cutler v. McPhail* [1962] 2 Q.B. 292.

⁸⁹ (1799) 8 T.R. 186.

⁹⁰ *Carmarthenshire C. C. v. Lewis* [1955] A.C. 549, at 560, *per* Lord Goddard.

⁹¹ s. 6 (1) (c).

⁹² Hence contribution may be ordered between several concurrent tortfeasors—e.g., two motorists, not engaged in a common design, whose combined negligence injures the plaintiff: *Pride of Derby & Derbyshire Angling Association, Ltd. v. British Celanese, Ltd.* [1952] 1 All E.R. 1326.

person as the result of a tort, judgment recovered ⁷⁷ against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage. "The language is curious. It contemplates the possibility of an action by an injured party against a person liable as a joint tortfeasor and at the same time regards him as having been sued by the injured party in a hypothetical action in the past." ⁷⁸ It is not very clear whether this hypothetical action is tied to the point of time at which the cause of action arose or to the date of the commencement of the action against the tortfeasor first sued, or to no definite moment at all.⁷⁹ The Act of 1935 also provides ⁸⁰ that if more than one action is brought in respect of the same damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the dependants ⁸¹ of that person against tortfeasors liable in respect of the damage ⁸² (whether as joint tortfeasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given,⁸³ and that the plaintiff shall not be entitled to costs in any of those actions except that in which judgment is first given,⁸⁴ unless the court is of opinion that there was reasonable ground for bringing the action.

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⁷⁷ So that if there is a release of one tortfeasor there is apparently no right of action against the other or others. *Aliter* in cases of contribution between tortfeasors; below § 186.

⁷⁸ *Wimpey (George) & Co. Ltd. v. B.O.A.C.* [1955] A.C. 188, at 194, *per* Lord Keith of Avonholm.

⁷⁹ See below, § 186.

⁸⁰ s. 6 (1) (b). Full discussion in Williams, *Joint Torts*, pp. 39-43.

⁸¹ This means the persons for whose benefit actions may be brought under the Fatal Accidents Acts, 1846 to 1959: Fatal Accidents Act, 1959, s. 1 (4).

⁸² "Liable" here cannot mean "held liable": it can only mean that a cause of action exists: *Wimpey (George) & Co., Ltd. v. B.O.A.C.* [1955] A.C. 188, 195.

⁸³ "Judgment first given" shall, where that judgment is reversed on appeal, be construed to refer to the judgment first given which is not so reversed; and where a judgment is varied on appeal it shall be construed to refer to the judgment so varied: s. 6 (3) (b).

⁸⁴ See s. 6 (8) (b).

been released, all persons otherwise liable thereto are consequently released.⁸⁵ This rule is equally applicable to a release under seal and to a release by way of accord and satisfaction.⁸⁶ A mere covenant or other agreement not to sue one of the joint wrongdoers must, however, be distinguished from an actual release given to him, whether by deed or by accord and satisfaction. An agreement not to sue does not, like a release, destroy the cause of action, but merely prevents it from being enforced against the particular wrongdoer with whom the agreement was made.⁸⁷ The distinction is technical but well-established.⁸⁸

§ 186. Contribution between Tortfeasors

“How some rules of law arose is not always known. For instance, except for the fact that in 1799 Lord Kenyon C.J. laid it down categorically in *Merryweather v. Nixan*⁸⁹ that there was no contribution between joint tortfeasors, no one has ever discovered whence the rule came, but it remained the law till abrogated by the Law Reform (Married Women and Tortfeasors) Act, 1935.”⁹⁰ That Act provides⁹¹ that where damage is suffered by any person as a result of a tort (whether a crime or not), any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise.⁹² The section thus provides for two cases—the normal one in which the plaintiff sues the two (or

⁸⁵ *Duck v. Mayeu* [1892] 2 Q.B. 511, 513. It has been suggested (Foster, “Law Revision” (1938) 2 M.L.R. 14, 20) that the principle upon which this rule is founded having been repudiated by the abolition of the rule in *Brinsmead v. Harrison*, this rule should also go. But the Act specifically makes a judgment a condition precedent to the right of contribution.

⁸⁶ *Thurman v. Wild* (1840) 11 A. & E. 453.

⁸⁷ *Duck v. Mayeu* 1892] 2 Q.B. 511. A transaction which is in form an actual release, whether by deed or by accord and satisfaction, will be construed as being merely an agreement not to sue, if it contains an express reservation of the right to proceed against the other wrongdoers. For this reservation would otherwise be wholly ineffective.

⁸⁸ *Cutler v. McPhail* [1962] 2 Q.B. 292.

⁸⁹ (1799) 8 T.R. 186.

⁹⁰ *Carmarthenshire C. C. v. Lewis* [1955] A.C. 549, at 560, per Lord Goddard.

⁹¹ s. 6 (1) (c).

⁹² Hence contribution may be ordered between several concurrent tortfeasors—e.g., two motorists, not engaged in a common design, whose combined negligence injures the plaintiff: *Pride of Derby & Derbyshire Angling Association, Ltd. v. British Celanese, Ltd.* [1952] 1 All E.R. 1326.

more) tortfeasors responsible for his damage in the same action, and the exceptional one in which he decides to proceed against only one of them. If the latter course is followed, the defendant is entitled to claim against any other tortfeasor not made a party to the action (the third party), and the third party then becomes a party to the action with the same rights in respect of his defence against any claim made against him, and otherwise, as if he had been sued by the defendant.⁹³

Some difficult problems

It will be noticed that the right to contribution is given only to a tortfeasor "liable" in respect of the plaintiff's damage, and only against a tortfeasor "who is, or would if sued have been, liable in respect of the same damage." Various problems have arisen as to the true interpretation of these words.

(1) If the word "liable" where it is first used is equivalent to "held liable," it would follow that a tortfeasor who had admitted liability and settled the claim made against him by the injured party would have no claim for contribution from any other tortfeasor. It is submitted that this is not so, and that a "tortfeasor liable" means one who can be compelled to pay by due process of law.⁹⁴ The law encourages reasonable settlements and there is no good reason why a tortfeasor should be obliged to defend an action in order to establish his right to contribution.⁹⁵

This is clearly the assumption of the Limitation Act, 1963, section 4 (2) (b), which provides a time-limit for claiming contribution when "the tortfeasor admits liability in favour of one or more persons in respect of that damage." It will be noted that the statute does not in terms deal with a tortfeasor who settles the claim without admitting liability—a not uncommon situation.

(2) It is plain from the context that the word "liable" where it is secondly used means "held liable."⁹⁶ Hence if the co-tortfeasor has actually been sued to judgment and held liable (whether in the same action in which the claimant has been held

⁹³ See Ord. 16 for the machinery of contribution and the explanation in *Hordern-Richmond Ltd. v. Duncan* [1947] K.B. 545, 552, and by Williams, *Joint Torts*, Chap. 4.

⁹⁴ *Hall v. Bonnett* [1956] S.A.S.R. 10, 15-17.

⁹⁵ *Baylis v. Waugh* [1962] N.Z.L.R. 44, in which the preceding sentences were cited with approval by McGregor J.

⁹⁶ All the Law Lords in *Wimpey's* case agreed on this.

liable or not) contribution can be recovered from him. Conversely it is also settled that no contribution can be recovered if the co-tortfeasor has been sued and held not liable, even though he would have been held liable if sued at some other time or in some other way.⁹⁷ But it is uncertain what the position would be if, although the co-tortfeasor has never been sued at all, it is established that if he had been he would have been held liable at one time but not at another (e.g., because he has been granted a release), for conflicting views have been expressed as to the moment of time at which the hypothetical suit in which he "would, if sued, have been liable" is to be presumed to have been commenced. While it is certain that this hypothetical suit must have been begun at some time before judgment was given against the defendant, it is uncertain when that moment of time must be supposed to have occurred. The preferred view now is that the right is ambulatory and has no temporal connotation.⁹⁸

(8) As the right of contribution is not a cause of action in tort but is a right *sui generis* the limitation period available in contribution proceedings was once held to be six years.⁹⁹ But now the Limitation Act, 1963, section 4, provides where a tortfeasor becomes entitled (after July 31, 1963) to a right to recover contribution in respect of any damages from another tortfeasor, no action to recover contribution shall be brought after the end of two years from the date on which that right accrued to the first tortfeasor. There is a saving (s. 4 (3)) for cases of fraud, disability and mistake. Section 4 (2) provides that the date on which the right to recover contribution accrued shall be ascertained as follows:

- (a) if the tortfeasor is held liable in respect of that damage by a judgment given in any civil proceedings, or an award made on any arbitration, the relevant date shall

⁹⁷ *Wimpey's Case* [1955] A.C. 169. The respondent in this case successfully claimed immunity from contribution on the ground that the action against him by the injured party had been held out of time under s. 21 of the Limitation Act, 1939 (since repealed). But "The same question would arise if the claimant tortfeasor alleged that the defence, though it succeeded on the merits, was successful only because the case had been inadequately presented or even because the judge or jury had taken a wrong view of it": Viscount Simonds, in [1955] A.C. at 178. See *Walsh v. Curry* [1955] N.I. 112.

⁹⁸ *Harvey v. O'Dell (R. G.), Ltd., Galway, Third Party* [1958] 2 Q.B. 78. See Jolowicz, Note, 22 M.L.R. 189. *Contra, Seagrim v. Brown* (1956) S.R.(N.S.W.) 127.

⁹⁹ *Harvey v. O'Dell, Ltd.* [1958] 2 Q.B. 78.

be the date on which the judgment is given, or the date of the award, as the case may be;

- (b) if, in any case not falling within the preceding paragraph, the tortfeasor admits liability in favour of one or more persons in respect of that damage, the relevant date shall be the earliest date on which the amount to be paid by him in discharge of that liability is agreed by or on behalf of the tortfeasor and that person, or each of those persons, as the case may be;

and for the purposes of this subsection no account shall be taken of any judgment or award given or made on appeal in so far as it varies the amount of damages awarded against the tortfeasor.

(4) If a plaintiff suffers damage from the concerted acts of two persons, of whom one is not liable because of some peculiar defence available to him, the entire loss must be thrown on the other.¹

Exception when right of indemnity between tortfeasors

The Act provides that no contribution can be recovered from a co-tortfeasor who is entitled to be indemnified by the person seeking contribution.² Thus:

(1) A wrongdoer cannot recover contribution from an innocent person whom he has led into the commission of a tort. For a principal must indemnify his agent for all liability incurred by him in consequence of the act authorised being (without the knowledge of the agent) an illegal one. This principle is of the widest general application.³ Thus an auctioneer is entitled to be indemnified by a client who has instructed him to sell goods to which, as it subsequently appeared, he had no title.⁴

(2) It is the converse of the former principle that a wrongdoing servant is obliged to indemnify his master who has been held vicariously responsible for the tort.⁵ Hence a servant who has been sued in respect of some tort committed in the course of his employment cannot claim an indemnity from his innocent master.

¹ For an example, see above, § 174.

² s. 6 (1) (c). See *Randolph v. Tuck* [1962] 1 Q.B. 175.

³ *Secretary of State v. Bank of India, Ltd.* [1938] 2 All E.R. 797, 801.

⁴ *Adamson v. Jarvis* (1827) 4 Bing. 66.

⁵ *Lister v. Romford Ice and Cold Storage Co., Ltd.* [1957] A.C. 555. See below, § 201.

Assessment of contribution

The framers of the Act of 1935 borrowed the principles of the Maritime Conventions Act, 1911,⁶ in determining the measure of contribution, and provided⁷ that in proceedings against any person for contribution the amount of the contribution recoverable should be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage, and gave the court power to exempt any person from liability, or to order a complete indemnity.⁸ The assessment must be made having regard to the parties who are before the court: the negligence or contributory negligence of a party not before the court cannot be considered.⁹ There has been some controversy whether the Act contemplates that damages should be apportioned on the basis of causation or on the basis of the respective degrees of fault or culpability of the parties. The latter seems the better view,¹⁰ and is in accord with the practice under the Maritime Conventions Act, 1911.¹¹

Agreement to indemnify

The above provisions all apply whether the tort is a crime or not.¹² This makes a striking exception to the general principle of the common law: *ex turpi causa non oritur actio*. It may be of great importance when so many actions are brought for breaches of duties which are also criminal offences—e.g., those imposed by the Factory Acts.¹³ But it is also provided¹⁴ that the

⁶ See above, § 94.

⁷ s. 6 (2).

⁸ As was done in, e.g., *Whitby v. Burt, Boulton & Hayward, Ltd.* [1947] K.B. 918. Scott L.J. in *Croston v. Vaughan* [1938] 1 K.B. 540, 565, thought the power of ordering a complete indemnity illogical, because the subsection assumed the joint liability of two tortfeasors.

⁹ *Maxfield v. Llewellyn* [1961] 1 W.L.R. 1119.

¹⁰ It has been adopted in *Weaver v. Commercial Process Co.* (1947) 63 T.L.R. 466 (*contra* *Collins v. Hertfordshire C.C.* [1947] K.B. 598) and is approved by Williams, *Joint Torts*, pp. 157-158; Chapman, 64 L.Q.R. 26 ("Causation itself is difficult enough; degrees of causation would really be a nightmare").

¹¹ The trial judge should deal with the question of contribution at the end of the trial: *Calvert v. Pick* [1954] 1 W.L.R. 456. Only in very exceptional cases should an appeal court interfere with the judge's apportionment: *The MacGregor* [1948] A.C. 197. A table showing the apportionments in some reported cases may be found in Williams, *Joint Torts*, p. 159.

¹² s. 6 (1).

¹³ See above, Chap. 11.

¹⁴ s. 6 (4) (c).

Act shall not render enforceable any agreement for indemnity which would not have been enforceable if the Act had not been passed. At common law an insured person cannot himself recover from his insurers if the contract purports to indemnify him against the consequences of his own intentional criminal act.¹⁵ It was also apparently settled that a contract to indemnify another against the consequences of committing a tort is unlawful, unless either the act to be done is not obviously tortious, or the party to be indemnified has been induced to commit it by the fraudulent statement of the other.¹⁶ The policy of protecting the victims of traffic accidents has also led to decisions whereby a contract of insurance is valid even though the circumstances of the accident gave rise to criminal liability (*e.g.*, manslaughter) on the part of the insured motorist.¹⁷ The result of the Act is "that if A considers he has against B a right of indemnity or contribution under a contract enforceable under the law as it was before the passing of the Bill, he can sue on that contract and in doing so will neither require nor receive any help from the Bill: if he considers that apart from the contract he has a right of contribution against B under the Bill, he can add an alternative claim for such contribution. In the event of his contract being held valid he will get what the contract provides for; in the event of its being held invalid, he will get under the Bill such amount, if any, as the court thinks he ought to have."¹⁸ But this would hardly permit one of two burglars who had been liable in damages to their victim to recover contribution from the other.¹⁹

Libel. The Law Reform Committee upon whose recommendations²⁰ the Act of 1985 was based gave as one instance of the hardship of the common law the case of *W. H. Smith & Son v. Clinton*.²¹ In that case the plaintiffs agreed to publish a newspaper for the defendants, one of the terms being that the defendants should give the plaintiffs a letter of indemnity against claims arising out of the publication of libellous matter in the

¹⁵ *Hardy v. Motor Insurers' Bureau* [1964] 2 Q.B. 745.

¹⁶ *W. H. Smith & Son v. Clinton* (1908) 99 L.T. 840, 841.

¹⁷ *Hardy v. Motor Insurers' Bureau* [1964] 2 Q.B. 745.

¹⁸ An extract from an unpublished memorandum on the Bill by its draftsman, Sir Granville Ram, K.C.B., K.C.

¹⁹ *Chapman, Statutes*, p. 17.

²⁰ Cmd. 4687.

²¹ (1908) 99 L.T. 840.

newspaper. A libel was published, and the plaintiffs were unsuccessful in their action on the letter of indemnity to recover the damages which they had paid to the person libelled, for they well knew the matter published was libellous. As the law now stands they might still be unable to recover on the letter of indemnity,²² but they might take proceedings for such contribution as might be found to be just and equitable.

§ 187. Persons Jointly Injured

Where two or more persons possess a right of action in respect of one and the same injury—as, for example, a trespass or other wrong to the property of co-owners, or a libel on a firm of partners in the way of their business—is it necessary that those persons should all join in one and the same action, or can one of them sue without the others? The old rule of the common law on this point was that (with certain exceptions which need not be now considered) all persons so suffering a joint injury must join in one action. But now the non-joinder of persons jointly injured is no bar to an action by one or some of them. The only effect of such a non-joinder is that the court may, in its discretion, order the other persons so jointly injured to be joined as parties to the action, either as plaintiffs or (if they will not consent) as defendants. Where two or more persons have suffered a joint, but not a several, injury, a release granted by one of them will, in the absence of fraud, destroy the whole cause of action, and operate as a bar to an action by any of the others.²³

§ 188. Principal and Agent

Any person who authorises or procures a tort to be committed by another is responsible for that tort as if he had committed it himself: *Qui facit per alium facit per se*. Principal and agent, therefore, are jointly and severally liable as joint wrongdoers for any tort authorised by the former and committed by the latter.

²² The Defamation Act, 1952, s. 11, provides only that agreements for indemnity in respect of liability for libel shall not be unlawful unless at the time of publication the person claiming to be indemnified knows that the matter is defamatory and does not reasonably believe there is a good defence to an action brought upon it.

²³ *Phillips v. Clagett* (1848) 11 M. & W. 84.

Ratification

If one person commits a tort while acting on behalf of another, but without his authority, and that other subsequently ratifies and assents to the act so done, he thereby becomes responsible for it, just as if he had given a precedent authority for its commission.²⁴ When an illegal act done by one person on behalf of another but without his authority would have been legal had it been done with his authority, it becomes legal *ab initio* if he subsequently ratifies it.²⁵ An act may be thus justified by ratification, even after the commencement of an action against the agent; but the ratification must in all cases have taken place at a time when the principal still retained the power of lawfully authorising the act to be done.²⁶ The following conditions must be fulfilled:

(1) The wrongful act must have been done on behalf of the principal. No man can ratify an act which was done, not on his behalf, but on behalf of the doer himself.²⁷ In the case of contracts it has been decided²⁸ that there can be no ratification unless the agent not merely contracts on behalf of the principal, but also avows that intention at the time. Possibly the same rule applies to torts also.²⁹ But the necessary avowal need not be expressed in words, but may sufficiently appear from the conduct of the parties and the facts of the case. It cannot be necessary for a railway official who arrests a passenger for defrauding the railway company to state in terms that he does so on behalf of the company.

(2) The principal must know the nature of the act which has thus been done on his behalf, unless, indeed, he is content to dispense with any such knowledge and to approve and sanction the acts of the agent whatever they may be.³⁰ It is sufficient, however, if the principal has such knowledge of the nature of the act as would have sufficed to make him liable had he actually authorised it or done it himself. Mistake or ignorance is no

²⁴ *Wilson v. Tumman* (1843) 6 M. & G. 236, 242.

²⁵ *Buron v. Denman* (1848) 2 Ex. 167.

²⁶ *Bird v. Brown* (1850) 4 Ex. 786.

²⁷ *Eastern Construction Co. v. National Trust Co.* [1914] A.C. 197, 213.

²⁸ *Keighley, Maxsted & Co. v. Durant* [1901] A.C. 240.

²⁹ *Keighley, Maxsted v. Durant* [1901] A.C. 240, 260.

³⁰ *Freeman v. Roshier* (1849) 18 Q.B. 780.

greater defence to a principal who gives an authority subsequent than to one who gives an authority precedent.³¹

§ 189. Partners

By the Partnership Act, 1890, ss. 10 and 12, it is provided, in affirmance of the common law, that partners are jointly and severally liable³² for each other's torts committed in the ordinary course of the business of the firm. Thus in *Hamlyn v. Houston & Co.*³³ a firm was held liable for the act of one of the partners who, on behalf of the firm, induced by bribery a servant of the plaintiff to commit a breach of his contract of service. Whether the act of a partner is one done in the course of the business of the firm is a question to be determined on the same considerations as those which determine the responsibility of a master for the acts of his servant. Indeed, for this purpose we may regard each partner as the servant of the firm.³⁴

§ 190. Vicarious Liability: Master and Servant³⁵

A master is jointly and severally liable for any tort committed by his servant while acting in the course of his employment. This is by far the most important of the various cases in which vicarious responsibility is recognised by the law. Although the doctrine of vicarious liability has its roots in the earliest years of the common law, it was Sir John Holt (1642-1710) who began the task of adapting medieval rules to the needs of a modern society, and his work was continued by the great Victorian judges. By the beginning of the twentieth century it was firmly established that the master's liability was based, not on the fiction

³¹ *Hilbery v. Hatton* (1864) 2 H. & C. 822.

³² As the liability is joint and several, there can be no judgment against the partnership or any of the partners if the actual tortfeasor has some immunity peculiar to himself: *Kliendienst v. A. Kliendienst & Sons* (1959) S.R.(N.S.W.) 150.

³³ [1903] 1 K.B. 81.

³⁴ *Meekins v. Henson* [1964] 1 Q.B. 472.

³⁵ Holdsworth, H.E.L., vii, pp. 472-482; Munkman, *Employer's Liability*; Hughes and Hudson, "A Master's Liability in the Law of Tort" (1953) 31 Can.Bar Rev. 18; Newark, "Twine v. Bean's Express Ltd." (1954) 17 M.L.R. 102; Hamson, [1954] C.L.J. 45; Fleming James, "Vicarious Liability" (1954) 28 Tulane L.R. 161; Glanville Williams, "Vicarious Liability" (1956) 72 L.Q.R. 522; "Liability for Independent Contractors" [1956] C.L.J. 180.

that he had impliedly commanded his servant to do what he did, but on the safer and simpler ground that it was done in the scope or course of his employment or authority. Hence the relationship of master and servant of itself gives rise to the liability.

Some different theories

It has never been possible to expound a theory which will at once explain and justify all aspects of the doctrine, although it has long been accepted as necessary and beneficial.³⁶ The maxim *respondeat superior* does not explain why the superior should answer: it "does not enshrine a principle, but announces rather a result."³⁷ The maxim *qui facit per alium facit per se*, although often cited with approbation, is similarly unhelpful. The truth is that "a mixture of ideas has inspired many unconvincing judicial efforts to find a common basis for the maxim. What was once presented as a legal principle has degenerated into a rule of expediency, imperfectly defined, and changing its shape before our eyes under the impact of changing social and political conditions."³⁸ But there is one idea which is found in the judgments from the time of Sir John Holt³⁹ to that of Lord Goddard,⁴⁰ namely, public policy. As Lord Brougham⁴¹ said: "The reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it." In short, vicarious liability is based on "social convenience and rough justice."⁴² This is an adequate explanation of the doctrine, subject to two qualifications. First, the master may be liable even though the act or default is not for his benefit, and even though he has expressly prohibited it.⁴³ Secondly, the master's right of control is the

³⁶ Few dissenting voices have been raised, though Lord Bramwell (always a sturdy individualist) opposed it in 1877: C. 285, p. 46.

³⁷ *Kilboy v. South-Eastern Fire Area Joint Committee*, 1952 S.C. 280 at 287, per Lord Keith. See also *Staveley Iron & Chemical Co., Ltd. v. Jones* [1956] A.C. 627, 643, and Maitland's explanation of the maxim's early history in P. & M., vol. ii, p. 533.

³⁸ 1952 S.C. at 285, per Lord Cooper.

³⁹ See his opinion cited below, § 196.

⁴⁰ *Broom v. Morgan* [1952] 2 All E.R. 1007, 1009.

⁴¹ *Duncan v. Finlater* (1889) 6 Cl. & F. 894, at 910.

⁴² *I.C.I. Ltd. v. Shatwell* [1964] 3 W.L.R. 329 at 348, per Lord Pearce.

⁴³ See below, § 195.

criterion of the existence of the relationship which gives rise to vicarious liability, and not in itself a justification of that liability. In all this there is no doubt that the courts have (perhaps unconsciously) been much influenced by the fact that the master is usually more able than the servant to satisfy claims by injured persons and can pass on the burden of liability by way of insurance.⁴⁴ There is also evidence to show that the imposition of strict liability on the master results in the prevention of accidents: the master takes more care than he would otherwise have done.⁴⁵

§ 191. The Nature of Vicarious Liability

There has been some discussion about this.⁴⁶ The traditional view assumes that the master is vicariously liable for the servant only when the servant himself would be liable. "In every case . . . the first question is to see whether the servant was liable. If the answer is yes, the second question is to see whether the employer must shoulder the servant's liability."⁴⁷ So in the normal case there has been only one tort, but as it has been committed in the course of employment the master is jointly responsible for it.⁴⁸ But three exceptional cases have caused difficulties.

(1) Sometimes the servant has not committed a tort (or at any rate an actionable tort) but the master is still responsible. Thus in *Broom v. Morgan*⁴⁹ the defendant, the licensee of the "Bird in Hand" public-house, West End Lane, Hampstead, employed both the plaintiff and her husband. The plaintiff was injured as a result of her husband's negligent act committed in the course of his employment, and the Court of Appeal held that she was entitled to hold the defendant vicariously responsible for

⁴⁴ See Williams, [1956] C.L.J. 195.

⁴⁵ See above, § 101.

⁴⁶ See literature cited above, § 190.

⁴⁷ *Young v. Edward Box & Co.* [1951] 1 T.L.R. 789, at 793, *per* Denning L.J. This view seems to have been adopted by the House of Lords in *Staveley Iron & Chemical Co. Ltd. v. Jones* [1956] A.C. 627, and in *I.C.I., Ltd. v. Shatwell* [1964] 3 W.L.R. 329, 335, 340-341, 349. This was clearly the assumption of the draftsman of the Crown Proceedings Act, 1947, s. 2 (1). But in later cases Denning L.J. seems to have departed from this simple view: below, note 61.

⁴⁸ Above, § 190. The term "vicarious liability" (which Pollock claimed to have invented: *Pollock-Holmes Letters*, Vol. i, p. 283) tends to conceal the important fact that the servant is also liable.

⁴⁹ [1953] 1 Q.B. 597.

it, even though she could not have sued her husband as the law then stood.⁵⁰ It has been said that such a decision (and indeed all decisions on vicarious liability) can be explained on the ground that it is the acts or omissions and not the torts of the servant which the law attributes to the employer: the true question is said to be whether the employer himself has broken his own personal duty to the plaintiff.⁵¹ But *Broom v. Morgan* itself is explicable on the simple ground preferred by the majority of the Court of Appeal—an immunity from suit conferred upon A cannot be taken advantage of by B.⁵² In so far as the new theory purports to supply a general basis for the doctrine of vicarious liability it is open to the following objections. First, it would revive the notion (forgotten since the mid-nineteenth century) that the master is liable because he commanded (expressly or impliedly) his servant to do the act: the modern view is based on the fact that the act was done in the course of the employment. Secondly, it would mean that master and servant would never be joint tortfeasors: each would have committed a distinct tort. Thirdly, it would mean that the master would be free from liability in many cases in which he is now held responsible. For his duty could not (save in some rather exceptional cases) be a strict one: it could only be a duty to take reasonable care. Hence it would be a defence for him to show that he had taken reasonable care to select an apparently competent servant—a defence which has never been allowed within modern times. There seems to be no reason to depart from the traditional theory.⁵³

⁵⁰ See above, § 181.

⁵¹ See Uthwatt J. in *Twine v. Bean's Express, Ltd.* [1946] 1 All E.R. 202, and Denning L.J. in *Broom v. Morgan* [1953] 1 Q.B. 597 and *Jones v. Staveley Iron Co., Ltd.* [1955] 1 Q.B. 474: his views were not approved by the H.L. in [1956] A.C. 627, or by Fullagar J. (*contra*, Taylor and Kitto JJ.) in *Darling Island Stevedoring Co. v. Long* (1957) 97 C.L.R. 36, but were in *Nadaraja v. Att.-Gen.* (1957) 54 Ceylon Law Weekly 65.

⁵² Further, the phraseology of the Married Women's Property Act, 1882, supports the conclusion that the husband's immunity was purely procedural. (But see above, § 181.) There are authorities analogous to *Broom v. Morgan*. Thus I am liable to be sued if my servant converts another's goods in circumstances amounting to felony but has not yet been prosecuted, and again I am vicariously liable for an assault by my servant although he has procured a certificate of dismissal under the Offences against the Person Act, 1861, s. 45. See *Osborn v. Gillett* (1873) L.R. 8 Ex. 88; *Dyer v. Munday* [1895] 1 Q.B. 742; *Corney v. Ministry of Labour* (1959) Public Law 170.

⁵³ Nor could the decision in *Armstrong v. Strain* [1952] 1 K.B. 282 be reconciled with the new view. *Contra*, Williams, 72 L.Q.R. 531-532.

(2) There is authority for saying that if the tort in question is solely the breach of a duty imposed directly upon the servant himself either by common law⁵⁴ or statute⁵⁵ the master is not vicariously liable for it: he will be liable, it is said, only if he has committed (as he may have) a breach of some duty laid upon him personally, or has intervened in the matter with express orders to the servant. These cases seem to have introduced an unnecessary subtlety and refinement into the law. They seem to be based upon the obsolete and misleading notion that vicarious liability depends upon the existence of the master's power to control the way in which the work is done: the true theory, however, is that the relationship of master and servant of itself gives rise to the liability, and that the right of control is only one factor in determining whether the relationship exists.⁵⁶

(8) Sometimes an injured person will be in the position of being able to allege that the defendant is liable to him on two distinct grounds—first, as vicariously responsible for the tort of his servant; secondly, as personally responsible for a breach of some obligation laid directly on him. So it seems that a hospital authority is not only vicariously responsible for those in its service but also under a primary obligation to take reasonable care to provide proper treatment.⁵⁷ But these duties are distinct in their nature and origin, and serious confusion may arise from a failure to keep them separate.⁵⁸

In order that this doctrine may apply, there are two conditions which must co-exist:

(1) The relationship of master and servant must exist between

⁵⁴ As with a police officer's power of arrest: *Fisher v. Oldham Corporation* [1930] 2 K.B. 364; *Att.-Gen. for N.S.W. v. Perpetual Trustee Co.* [1955] A.C. 457.

⁵⁵ As with a sanitary inspector's power to seize diseased animals: *Stanbury v. Exeter Corporation* [1905] 2 K.B. 838. The similar point raised in *England v. National Coal Board* [1953] 1 Q.B. 724 has been settled by the Mines and Quarries Act, 1954, s. 159. Cf. *Stapley v. Gypsum Mines Ltd.* [1953] A.C. 669, 685. There is no clear English decision, but the High Court of Australia has decided that the master is not liable: *Darling Island Stevedoring Co., Ltd. v. Long* (1957) 97 C.L.R. 36.

⁵⁶ So far as Crown servants are concerned, the point is provided for by the Crown Proceedings Act, 1947, s. 2 (3): *The Truculent* [1952] P. 1.

⁵⁷ See below, § 192.

⁵⁸ See *Staveley Iron & Chemical Co., Ltd. v. Jones* [1956] A.C. 627.

the defendant and the person committing the wrong complained of;

- (2) The servant must in committing the wrong have been acting in the course of his employment.

We shall consider each in turn.

§ 192. Who is a Servant?

A servant may be defined as any person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done.⁵⁹ If we use the term agent to mean any person employed to do work for another, we may say that agents are of two kinds, distinguishable as servants and independent contractors.⁶⁰ It is for the first kind of agent only that his employer is responsible under the rule which we are now considering. When the agent is an independent contractor, his employer is not, in general, answerable for the torts either of the contractor himself or of his servants. But when the agent is a servant, his employer will answer for all torts committed in the course of the employment, whether or not the employer has obtained any benefit thereby.

⁵⁹ This definition can "hardly be bettered," according to MacKinnon L.J. in *Hewitt v. Bonvin* [1940] 1 K.B. 188, at 191.

⁶⁰ A distinction is sometimes drawn between agents, servants and independent contractors, as in *Hewitt v. Bonvin* [1940] 1 K.B. 188, 194-196. Those whose employment is more or less continuous are usually called servants, those whose employment is intermittent or confined to a particular occasion, agents. But, so far as the law of torts is concerned, there is no difference between the position of a servant and an agent in this narrower sense and the distinction is unimportant. All agents are either servants or independent contractors. The statement of MacKinnon L.J. in *Hewitt's Case* [1940] 1 K.B. at 191, that if the wrongdoer was the agent, as distinct from the servant, of the defendant, the plaintiff must show that the defendant authorised the act, though in accordance with the views of Salmond, 6th ed., p. 92, does not seem to be supported by authority: Holdsworth, H.E.L., viii, p. 227. A vendor is neither an agent nor an independent contractor. If an order is placed for 500 fireworks to be manufactured, and the manufacturer finds the material, when the fireworks are delivered it will be in performance of a contract of sale; but if the material is provided by the person placing the order, the manufacturer is an independent contractor. It is the same as the Roman law distinction between *emptio-venditio* and *locatio-conductio*, D. xviii, 1, 20. (A failure to understand this point has caused confusion to a writer in J.S.P.T.L. (1935), 67.) Agency in contract differs from agency in the law of torts.

Servant distinguished from independent contractor

What, then, is the test of this distinction between a servant and an independent contractor? The test is the existence of a right of control over the agent in respect of the manner in which his work is to be done. A servant is an agent who works under the supervision and direction of his employer; an independent contractor is one who is his own master. A servant is a person engaged to obey his employer's orders from time to time; an independent contractor is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it—he is bound by his contract, but not by his employer's orders.⁶¹ Thus my chauffeur is my servant; and if by negligent driving he runs over someone in the street, I am responsible. But the cabman whom I engage for a particular journey is not my servant; he is not under my orders; he has made a contract with me, not that he will obey my directions, but that he will drive me to a certain place: if an accident happens by his negligence, he is responsible and not I.⁶² So I am responsible for the domestic servants in my house, but I am not responsible for a skilled man whom I engage to do a certain job in my house—for example, to paint it, or to mend a window. (Nor, as we shall see, am I responsible to him for the safety of my premises to the same degree as I am to a servant.⁶³)

This may be put in another way by drawing a distinction between one employed under a contract of service (a servant) and one employed under a contract for services (an independent contractor). "The distinction between a contract for services and a contract of service can be summarised in this way: In the one case the master can order or require what is to be done, while in the other case he can not only order or require what

⁶¹ *Quarman v. Burnett* (1840) 6 M. & W. 499, 509; *Performing Right Society, Ltd. v. Mitchell and Booker, Ltd.* [1924] 1 K.B. 762; *Honeywill and Stein v. Larkin* [1934] 1 K.B. 191, 196.

⁶² The preceding sentences were cited with approval by McCardie J. in the *Performing Right Society Case* [1924] 1 K.B. at 768. "The late Mr. Southmayd, of New York, though he possessed a fine carriage and horses, used always to drive in a hired conveyance for this reason": *Baty, Vicarious Liability*, p. 38n. Note that the proprietors of cabs are responsible for the negligence of the drivers to whom they are hired (in London, under the London Hackney Carriages Act, 1848; elsewhere, under the Town Police Clauses Act, 1847), even though the relationship is really that of bailor and bailee.

⁶³ See below, § 199.

is to be done but how itself it shall be done.”⁶⁴ This right of control has always been accepted since the time of Baron Bramwell⁶⁵ as the essential mark of a contract of service. Other marks of a contract of service are (i) the master’s power of selection of his servant, (ii) the payment of wages or other remuneration, (iii) the master’s right of suspension or dismissal. On the servant’s side there is an obligation to present himself for work at the agreed time, to obey all reasonable directions, to continue to work for the agreed period, and also to indemnify his master against liability to third parties.⁶⁶ Yet it cannot be doubted that a contract of service may exist although one or more of these elements is absent altogether or present only in an unusual form.⁶⁷ The House of Lords has reserved the right to restate the elements of a contract of service in the light of modern industrial conditions,⁶⁸ for the powers of the Minister of Labour to control or direct entry into employment and the restrictive practices of trade associations and trade unions may affect materially the position of an employer as it was formerly understood.

The right of control

One criticism of this distinction between a contract of service and a contract for services is that there are many contracts which are undoubtedly contracts of service but in which the master does not or cannot control the way in which the work is done: the captain of a ship and the house surgeon at a hospital are each under a contract of service but each would greet with some astonishment a direction from his employers stating how a particular task was to be performed. Indeed in many cases the employer lacks the technical skill necessary to give such a direction. Or, even though he may have the skill, he may not have the time, as would be the case in fast-moving modern traffic, even if the employer were the most skilled of drivers and was sitting beside his servant.⁶⁹ But although the distinction

⁶⁴ *Collins v. Hertfordshire C. C.* [1947] K.B. 598, at 615, *per* Hilbery J.

⁶⁵ *Yewens v. Noakes* (1880) 6 Q.B.D. 530, 532–533. See W. H. D. Winder, Note, 80 L.Q.R. 160.

⁶⁶ See below, § 201.

⁶⁷ *Kilboy v. S. E. Fire Area Joint Committee*, 1952 S.C. 280, 285–286.

⁶⁸ *Short v. Henderson (J. W.), Ltd.* (1946) 62 T.L.R. 427, 429; *Pauley v. Kenaldo Ltd.* [1953] 1 W.L.R. 187.

⁶⁹ *Union S.S. Co. v. Colville* [1960] N.Z.L.R. 100, 109.

may ultimately rest on economic theories no longer fashionable,⁷⁰ it is still a very real one.⁷¹ An employer may well be unable or unwilling to give specific orders to a skilled man, thinking it best to allow him to carry out the task in his own way,⁷² but that will not relieve him from liability. It does not follow that because in any particular case it has not been found necessary to exercise a paramount authority that that authority does not exist.⁷³ As Lord Porter said in *Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool), Ltd.*,⁷⁴ "the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done." Indeed, in this very case, where the issue was whether the general or special employer was vicariously liable for the negligence of a driver of a crane, the driver had said in evidence: "I take no orders from anybody." That, as Lord Simonds remarked, was "a sturdy answer which meant that he was a skilled man and knew his job and would carry it out in his own way. Yet ultimately he would decline to carry it out in the appellants' way at his peril, for in their hands lay the only sanction, the power of dismissal."⁷⁵ Perhaps it would be better to make the test of control depend on the master's right to control the servant's time rather than the manner of doing his job in that time.⁷⁶

Hospital cases. These principles have been much discussed in a series of cases dealing with the liability of hospital authorities

⁷⁰ See this brought out by Professor Kahn-Freund, 14 M.L.R. 504.

⁷¹ "It is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man, and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it": *Stevenson, Jordan & Harrison, Ltd. v. Macdonald* [1952] 1 T.L.R. 101, at 111, *per* Denning L.J.

⁷² "A good leader of men (and an employer is a leader of men) leaves to his men as much discretion as he can, otherwise unforeseen circumstances will upset the best laid plan": *Winter v. Cardiff R. D. C.* [1950] 1 All E.R. 819, at 828, *per* Lord Oaksey. See also below, § 199.

⁷³ *Samson v. Aitchison* (1911) 90 N.Z.L.R. 160, 165.

⁷⁴ [1947] A.C. 1, at 17.

⁷⁵ *Ibid.*, at 20.

⁷⁶ W. H. D. Winder, Note, 80 L.Q.R. 160.

for their staff. For many years uncertainty prevailed because of the opinion expressed in *Hillyer v. St. Bartholomew's Hospital*⁷⁷ that a hospital was not responsible for the negligence of its professional staff (including trained nurses) in matters involving professional care and skill as distinct from matters of a purely administrative nature. But in *Gold v. Essex C.C.*⁷⁸ the Court of Appeal repudiated this opinion and held a hospital authority liable for the negligence of a radiographer employed under a full-time contract of service. The position of the permanent medical staff was considered by Hilbery J. in *Collins v. Hertfordshire C.C.*,⁷⁹ where the defendants were held liable for the negligence of a resident house-surgeon employed under a contract of service, and by the Court of Appeal in *Cassidy v. Ministry of Health*.⁸⁰ In the latter case the plaintiff's hand was rendered useless by the negligent post-operational treatment afforded by the full-time employees (assistant medical officer, house surgeon and nurses) of the hospital authority, each of whom was employed under a contract of service. The fact that these employees were exercising professional care and skill was held to be no defence. There can be no doubt that the principle of these cases applies to the hospital authorities (regional hospital boards and hospital management committees) who administer the health service set up under the National Health Service Act, 1946, and that they will accordingly be liable for any negligence established against their permanent medical staff.⁸¹ It is said to be uncertain whether there is liability for a visiting or consulting surgeon or physician (although in *Roe v. Minister of Health*⁸² the Court of

⁷⁷ [1909] 2 K.B. 820, 829, *per* Kennedy L.J. Farwell L.J. took a different view. It is important to note that the accident in this case occurred in an operating theatre when a consulting surgeon was in charge. The court may also have been influenced by a reluctance to impose liability upon voluntary charitable bodies (as hospitals then were).

⁷⁸ [1942] 2 K.B. 293; Lord Denning was counsel for the plaintiff: see (1959) 5 J.S.P.T.L. 85.

⁷⁹ [1947] K.B. 598 (lethal cocaine injected instead of harmless procaine).

⁸⁰ [1951] 2 K.B. 343.

⁸¹ *Macdonald v. Glasgow Western Hospitals Board of Management*, 1954 S.C. 453. It is also generally accepted that the hospital authority and not the Minister of Health is the proper defendant even though the hospital authority is carrying on the services of the Crown: *Pfizer Corporation v. Minister of Health* [1965] 2 W.L.R. 387. This is the assumption of circular H.M. (54) (issued by the Ministry of Health), which contains detailed provisions for the conduct of such actions, insofar as they may affect the various possible parties—doctors, hospital authorities, and medical defence societies.

⁸² [1954] 2 Q.B. 66.

Appeal was prepared to impose liability for the acts of a part-time specialist anaesthetist), as such a person is not employed under a contract of service so as to attract the operation of the doctrine *respondeat superior*.⁸³ But it seems that there is no need to pray in aid of that doctrine. Under the National Health Service Act, 1946, a hospital authority is itself under a duty to provide treatment and not merely to make arrangements for treatment by and at the sole risk of independent specialist contractors. This duty, the scope of which in any particular case is a question of fact, is one which cannot be delegated, and the professional man who performs it does so as the agent of the hospital authority (unless he has been selected and employed by the patient himself).⁸⁴ Hence the word "consultant" is now rather a title denoting the holder's place in the hospital staff than a term denoting his relationship with the hospital authority.⁸⁵ Probably the courts today will hold that the hospital is also liable for the acts of its nurses done in the operating theatre on the orders of the surgeon.⁸⁶

Temporary or gratuitous service sufficient

One person may be the servant of another although employed not continuously, but for a single transaction only, and even if his service is gratuitous or *de facto* merely. The relationship of master and servant is commonly a continuing engagement in consideration of wages paid; but this is not essential. One person may be the servant of another on a single occasion and for an individual transaction, provided that the element of control and supervision is present. Moreover, the service may be merely gratuitous,⁸⁷ as when a child acts *de facto* as the servant of his father or the owner of a vehicle asks a friend to drive it for him. The test of service is not physical control, but the right to

⁸³ *Gold's Case* [1942] 2 K.B. 293, 299, 305, 313; *Collins v. Hertfordshire C.C.* [1947] K.B. 598, 619; *Cassidy v. Ministry of Health* [1951] 2 K.B. 343, 351, 358.

⁸⁴ *Gold's Case* [1942] 2 K.B. 293; *Cassidy's Case* [1951] 2 K.B. 343; *Roe's Case* [1954] 2 Q.B. 66; *Razzel v. Snowball* [1954] 1 W.L.R. 1382; *Macdonald v. Glasgow Western Hospitals Board of Management*, 1954 S.C. 453. See also Grunhut, "Recent Developments in Hospital Cases" (1954) 17 M.L.R. 547; Nathan, *Medical Negligence*, 144.

⁸⁵ *Razzel v. Snowball* [1954] 1 W.L.R. 1382, 1386.

⁸⁶ *Gold's Case* [1942] 2 K.B. 293, 299, 305, 313; *Cassidy's Case* [1951] 2 K.B. 343, 361-362; *Fox v. Glasgow South Western Hospitals*, 1955 S.L.T. 337.

⁸⁷ *Johnson v. Lindsay* [1891] A.C. 371, 377. See the cases on volunteers above, § 14.

control.⁸⁸ The right of control may be deduced from the fact that the owner of the motor-car remains in it while allowing another to drive,⁸⁹ even though the speed of modern traffic may render his right of control meaningless. Even if there is no right of control the owner of the car may be liable if he has delegated to the other the duty of looking after it,⁹⁰ or if it is being used wholly or partly on the owner's business or for the owner's purposes. The owner will escape liability, however, if he can show that the motor-car has been lent or hired for purposes in which he has no interest or concern. In such a case the driver is the owner's bailee and not his servant.⁹¹ The distinction may be seen if we compare *Ormrod v. Crosville Motor Services, Ltd.*⁹² with *Britt v. Galmoye*.⁹³ In the former case the owner of a Healey car was held liable for the negligence of a friend who was driving it from Birkenhead to Monte Carlo: for it was proposed that on arrival they should use it for a joint holiday. But in the latter case a master was not liable when he lent his private motor-car to his servant to enable him to take his friends to the theatre after the day's work. It has even been held that one who is neither the owner of the car nor the employer of its driver but merely a passenger in it may be responsible for the driver's negligence.⁹⁴ The truth is that no clear legal principle capable of justifying these decisions has as yet emerged,⁹⁵ however desirable they may be as reflecting a judicial policy to protect users of the highway.

§ 193. Servant with two Masters

A servant may have two or more masters at the same time in respect of different employments. In particular a master may

⁸⁸ See above, § 191.

⁸⁹ *Samson v. Aitchison* [1912] A.C. 844; *Pratt v. Patrick* [1924] 1 K.B. 488; *Chowdhary v. Gillot* [1947] 2 All E.R. 541; *The Trust Co. v. de Silva* [1956] 1 W.L.R. 376.

⁹⁰ See *Hewitt v. Bonvin* [1940] 1 K.B. 188, 195-196, and *Norton v. Canadian Pacific Steamships, Ltd.* [1961] 1 W.L.R. 1057.

⁹¹ Cf. the doctrine of imputed negligence, above, § 96.

⁹² [1958] 1 W.L.R. 1120. See "*Thelma*" (*Owners*) v. *University College School* [1953] 2 Lloyd's Rep. 613.

⁹³ (1928) 44 T.L.R. 294. See *Norton v. Canadian Pacific Steamships, Ltd.* [1961] 1 W.L.R. 1057; Brooke-Smith, "Liability for the Negligence of Another" (1954) 70 L.Q.R. 253.

⁹⁴ *Scarsbrook v. Mason* [1961] 3 All E.R. 767.

⁹⁵ *Soblusky v. Egan* (1960) 103 C.L.R. 215, 229.

lend or hire his servant to another person for a certain transaction so that *quoad* that employment he becomes the servant of the person to whom he is so lent, though he remains for other purposes the servant of the lender. When a servant is sent by his employer to do work for another, it is a question of fact, depending on the nature of the arrangement and the degree of control exercised over the servant, whether he becomes temporarily the servant of the person for whom he is working or remains in all respects the servant of his ordinary employer. When a servant has thus two masters, the responsibility for a tort committed by him lies exclusively upon the master for whom he was working when he did the act complained of. It must lie on one or the other; for the law does not recognise a several liability in two principals who are unconnected.⁹⁶ The question may be important in modern industrial conditions, when the servants of an employer and the servants of his contractors and sub-contractors often work together on the same task—for example, a large new building. As in general an employer is not liable for the torts of his contractor's servants (and never for their acts of collateral negligence ⁹⁷), a person injured by such a tortious act will be obliged, if he wishes to proceed against the main employer, to prove that he has become the temporary master of the delinquent servant of his own contractor.⁹⁸

The Mersey Docks Case

The law was restated by the House of Lords in *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd.*⁹⁹ The appellant board owned a number of mobile cranes, each driven by a skilled workman engaged and paid by them, which they were accustomed to let out on hire. The respondents, master stevedores, hired one of these cranes so driven to load a ship. The contract provided that the driver should be the servant of the hirers. In the course of the loading a third party was injured through the driver's negligence. At

⁹⁶ *Laugher v. Pointer* (1826) 5 B. & C. 547, at 558, *per* Littledale J. See *Treacy v. Robinson & Son* [1937] I.R. 255, 266.

⁹⁷ See below, § 202.

⁹⁸ He may be able to frame his claim in another way—*e.g.*, for breach of the duty owed by an occupier of premises.

⁹⁹ [1947] A.C. 1. See also *John Young & Co. v. O'Donnell* (1958), H.L., unreported; *Lindsay v. U.S.S. Co., Ltd.* [1960] N.Z.L.R. 486.

the time of the accident the stevedores had the immediate direction and control of the operations to be executed by the crane-driver—e.g., the power to order him to pick up and move a particular piece of cargo. But they had no power to direct the driver how to manipulate the crane or its controls. It was held that the harbour board as the driver's general employers were responsible for his negligence. In such a case a heavy burden of proof rests on the general or permanent employer to shift his *prima facie* responsibility for the negligence of servants employed and paid by him onto the hirer who for the time being has the advantage of the particular service rendered. No universal test can be laid down. "Who is paymaster, who can dismiss,¹ how long the alternative service lasts, what machinery is employed,² have all to be kept in mind."³ If an employer sends out a skilled man to work for another, the general rule is that he remains the servant of the general employer.⁴ The question will often be answered by asking who has the right to control the way in which the work is to be done.⁵ The hirer (as in the *Mersey Docks* case) may often have control over the task to be performed but not over the way in which it is to be done. The hirer may, of course, intervene to give a specific order which is in fact obeyed by the workman, and if damage then results he will in general be liable as a joint tortfeasor with the workman, but this is not by reason of any relationship of master and servant.⁶ Nor is it conclusive that (again as in the *Mersey Docks* case) the two employers have made a contract stating whose servant the employee is to be on the particular occasion: servants cannot be transferred from one service to another

¹ This is not conclusive: *Garrard v. Southey & Co.* [1952] 2 Q.B. 174, 180.

² There may be a distinction between a case where a complicated piece of machinery and a driver are lent and a case where labour only (and not necessarily of a skilled character) is transferred. In the former case it may be more difficult to assume that the general employer intended to allow the hirer to direct the manner in which a valuable piece of machinery should be operated: *Garrard v. Southey & Co.* [1952] 2 Q.B. 174, 179; *Denham v. Midland Employers Mutual Assurance, Ltd.* [1955] 2 Q.B. 437.

³ *Mersey Docks Case* [1947] A.C. at 17, per Lord Porter.

⁴ *Savory v. Holland, Hannen and Cubitts (Southern), Ltd.* [1964] 1 W.L.R. 1158.

⁵ Yet see Lord Wright in *Century Insurance Co. v. Northern Ireland Road Transport Board* [1942] A.C. 509; 517. The fact that he who has the right of control may not have the requisite technical knowledge to give an order is irrelevant: see above, § 192.

⁶ *Mersey Docks Case* [1947] A.C. 1, 12.

without their consent.⁷ Such a contract may determine the liability of the employers *inter se* but it has only an indirect bearing on the question which of them is to be regarded as master of the workman on a particular occasion.⁸ But it may be easier to assume a transfer of employment when the plaintiff is not a third party, but the workman himself, who is claiming that he has been injured by reason of the hirer's failure to fulfil some duty owed by an employer to his servants—*e.g.*, the duty to provide a safe system of work.⁹

Superior servant not responsible for subordinates

A superior servant is not the master of the inferiors who are under his control, and he is not responsible for their torts. Thus strike pickets appointed by a trade union are not the servants of the executive committee or general secretary of the union.¹⁰ Again, the directors of a company are not responsible for the torts committed by inferior servants of the company, although those servants are appointed and controlled by the directors, and even though the directors are the sole directors and sole shareholders in the company.¹¹ Any other decision would destroy the whole object of the Companies Act, which is that the limited liability of a company should be substituted for the unlimited liability of individuals, so that enterprise and adventure may be encouraged. But it should be noted that an officer of a company, whether a director or some other official, is capable of being a joint tortfeasor with the company itself, which of course would also be vicariously responsible for his wrongful acts.¹² It has become increasingly common so to join individual servants in actions against their companies.

⁷ *Mersey Docks Case* [1947] A.C. 1, 14. Such a transfer may well involve difficult questions of health and accident insurance benefits, and this increases the strength of the presumption against it: *Denham v. Midland Employers Mutual Assurance, Ltd.* [1955] 2 Q.B. 437.

⁸ *Herdman v. Walker (Tooting), Ltd.* [1956] 1 W.L.R. 209; *The Panther and the Ericbank* [1957] P. 143.

⁹ *Johnson v. J. H. Beaumont Ltd.* [1953] 2 Q.B. 184; *Keegan v. Owens* [1953] I.R. 267; *Gibb v. United Steel Companies, Ltd.* [1957] 1 W.L.R. 668.

¹⁰ *Bird v. O'Neal* [1960] A.C. 907.

¹¹ *British Thomson-Houston Co. v. Sterling Accessories, Ltd.* [1924] 2 Ch. 33; *Performing Right Society v. Cyril Theatrical Syndicate* [1924] 1 K.B. 1, 14.

¹² *Yuille v. B. & B. Fisheries (Leigh), Ltd. and Bates* [1958] 2 Lloyd's Rep. 596.

§ 194. The Course of Employment

A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master.¹³ It is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all.¹⁴ But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes—although improper modes—of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it. If a servant does negligently that which he was authorised to do carefully, or if he does fraudulently that which he was authorised to do honestly, or if he does mistakenly that which he was authorised to do correctly, his master will answer for that negligence, fraud or mistake.¹⁵ “In all these cases,” said Willes J., delivering the judgment of the Court of Exchequer Chamber in *Barwick v. English Joint Stock Bank*,¹⁶ “it may be said that the master has not authorised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.”

On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in

¹³ This definition was cited with approval by Bankes L.J. in *Poland v. Parr (John) & Sons* [1927] 1 K.B. 236, 240 by Hilbery J. in *Warren v. Henlys, Ltd.* [1948] 2 All E.R. 935, 937 and by Willmer, Danckwerts, and Diplock L.J.J. in *Ilkiw v. Samuels* [1963] 1 W.L.R. 991, 997, 1002, 1004.

¹⁴ See above, § 188.

¹⁵ He will be liable in an action on the case, even if a trespass is an incident in the wrong done: *Goh Choon Seng v. Lee Kim Soo* [1925] A.C. 550; Newark, 19 M.L.R. 106.

¹⁶ (1867) L.R. 2 Ex. 259, at 266.

the course of his employment, but has gone outside of it.¹⁷ He can no longer be said to be doing, although in a wrong and unauthorised way, what he was authorised to do; he is doing what he was not authorised to do at all. Thus in *Beard v. London General Omnibus Co.*¹⁸ the defendant company was held not liable for a collision caused by the negligence of the conductor of an omnibus, who, at the end of a journey and in the temporary absence of the driver, took upon himself to drive the omnibus for the purpose of turning it round for the return journey. Driving an omnibus is not a mode, rightful or wrongful, of performing the duties of a conductor; and the accident happened, not because the conductor failed to perform his own duty, but because without authority he attempted to fulfil that of a driver. There are, however, cases in which it has been held that a servant who is authorised to drive a motor-vehicle, and who permits an unauthorised person to drive it in his place, may yet be acting within the scope of his employment.¹⁹ The act of permitting another to drive may be a mode, albeit an improper one, of doing the authorised work. The master may even be responsible if the servant impliedly, and not expressly, permits an unauthorised person to drive the vehicle, as where he leaves it unattended in such a manner that it is reasonably foreseeable that the third party will attempt to drive it.²⁰

On the same principle, in *Abrahams v. Deakin*,²¹ the owner of a public-house in Holborn was held not liable for the act of his servant who, while in charge of the bar, gave the plaintiff, a solicitor, into custody on a mistaken charge of having attempted to pass bad money. For a master is not responsible for the negligence or other wrongful act of his servant simply because

¹⁷ The first three sentences of the previous paragraph and this sentence were cited with approval by the Judicial Committee in *Canadian Pacific Ry. v. Lockhart* [1942] A.C. 591, 599; and by the courts in *Warren v. Henlys, Ltd.* [1948] 2 All E.R. 935, 938; *London County Council v. Cattermoles (Garages), Ltd.* [1953] 1 W.L.R. 997, 998; *Hamilton v. Farmers', Ltd.* [1953] 3 D.L.R. 382, 386; *Kirby v. National Coal Board*, 1958 S.C. 514, 533, 540; *Daniels v. Whetstone Entertainments, Ltd.* [1962] 2 Lloyd's Rep. 1, at 5 ("cannot be bettered": *per* Davies L.J.); *Ilkiw v. Samuels* [1963] 1 W.L.R. 991; *Att.-Gen. v. Hartley* [1964] N.Z.L.R. 785, 801.

¹⁸ [1900] 2 Q.B. 590.

¹⁹ *Ilkiw v. Samuels* [1963] 1 W.L.R. 991.

²⁰ *Fulwood House, Ltd. v. Standard Bentwood Chair, Ltd.* [1956] 1 Lloyd's Rep. 160.

²¹ [1891] 1 Q.B. 516.

it is committed at a time when the servant is engaged on his master's business. It must be committed in the course of that business, so as to form a part of it, and not be merely coincident in time with it. This is further illustrated by cases in which a servant invites another to come onto his master's property,²² or invites one who is already lawfully upon it to engage in some activity or to go to some place which is outside the area of the original invitation,²³ and that other, although knowing that the servant has no authority to extend such an invitation,²⁴ accepts it and is injured as a result of the defective condition of the property. The plaintiff's status as a trespasser is not altered by the servant's unauthorised invitation, for which the master is not responsible.

We may contrast with these cases the decision of the House of Lords in *Century Insurance Co. v. Northern Ireland Road Transport Board*,²⁵ in which the driver of a petrol lorry, whilst transferring petrol from the lorry to an underground tank, struck a match to light a cigarette and threw it on the floor, and thereby caused a fire and an explosion which did great damage. It was held that his employers were liable. His negligence was negligence in the discharge of his duties. Though the act of lighting his cigarette was done for his own comfort and convenience and was in itself both innocent and harmless, it could not be regarded in abstraction from the circumstances and was a negligent method of conducting his work. Another illustration of contemporary labour practices, in which the decision went the other way, was *Hilton v. Thomas Burton (Rhodes), Ltd.*²⁶ Four workmen were permitted to use their employers' Bedford van to go to work on a demolition site in the country. After half a day's work they decided to knock off and go to a café seven miles away for tea. When they had almost reached the café

²² As in *Twine v. Bean's Express* [1946] 1 All E.R. 203 (motor vehicle).

²³ As in *Hillen v. I.C.I. (Alkali), Ltd.* [1936] A.C. 65 where the crew of a barge invited stevedores to unload cargo in a dangerous and prohibited way. Lord Atkin said: "The owner of a barge does not clothe the crew with apparent authority to use it or any part of it for purposes which are known to be extraordinary and dangerous. The crew could not within the scope of their employment convert it into a dancing hall or drinking booth. They could not invite stevedores to work the engines or take part in the navigation."

²⁴ If he did not know this, he may still be without a remedy: see n. 44 below.

²⁵ [1942] A.C. 509.

²⁶ [1961] 1 W.L.R. 705.

they changed their minds and started back again. On the journey one of them was killed through the negligent driving of another. The employer was not vicariously responsible, as the men were "on a frolic of their own."²⁷

Ostensible authority

The authority may be merely inferred from the circumstances. In such cases, in order to make the master responsible, the act must be done in the master's interest, and not for the servant's own purposes. As a general rule a servant has an implied authority upon an emergency to endeavour to protect his master's property if he sees it in danger or has reasonable ground for thinking that he sees it in danger.²⁸ In an emergency a servant may be impliedly authorised to do an act different in kind from the class of acts which he is expressly authorised or employed to do.²⁹ So in *Poland v. John Parr & Sons*³⁰ where a carter, whilst off duty, seeing his employers' wagon apparently being robbed by boys, in order to prevent the theft struck one of the boys, who in consequence was run over and lost his leg, the employers were held liable. The distinction between this case and *Abrahams v. Deakin*³¹ is that the courts are more ready to infer that a servant has authority to act for the protection of his master's property than that he has authority to punish for a supposed infringement of the law.

Where there is no ostensible authority the third person is put on inquiry as to whether there is any actual authority, and, if there is not, the master will not be liable.³² So the third person must be taken to know that the master of a ship has no authority to sign a bill of lading for goods which have not been shipped,³³ that a secretary of a company can only sign documents which he is in fact authorised by the directors to sign,³⁴ and

²⁷ This phrase, which goes back to Parke B. in *Joel v. Morison* (1884) 6 C. & P. 501, 508, is often used as a rough test of liability.

²⁸ *D'Urso v. Sanson* [1939] 4 All E.R. 26.

²⁹ *Poland v. John Parr & Sons* [1927] 1 K.B. 236, 244.

³⁰ [1927] 1 K.B. 236.

³¹ [1891] 1 Q.B. 516.

³² *Contra, Navarro v. Moregrand, Ltd.* [1951] 2 T.L.R. 674, 680.

³³ *Grant v. Norway* (1851) 10 C.B. 665.

³⁴ *Kleinwort, Sons & Co. v. Associated Automatic Machine Corporation* (1934) 151 L.T. 1; *Uxbridge Permanent Benefit Building Society v. Pickard* [1939] 2 K.B. 248, 258. Would the defendants in the *Kleinwort* case have

that a solicitor has no authority to alter his client's cheques.³⁵ Whether the act is within the scope of the agent's authority should be tested, if he has a permanent employment, by reference to the ordinary duties of that employment, which he clearly cannot extend by a fraudulent act. If it is an agency authorising a special act, the agent will not bind the principal to an extent beyond that which is reasonably to be inferred from the nature of that special employment and the duties incident to it.³⁶

§ 195. Effect of Express Prohibition

Even express prohibition of the wrongful act is no defence to the master, if that act was merely a mode of doing what the servant was employed to do.³⁷ Thus in *Limpus v. London General Omnibus Co.*³⁸ the defendant company was held liable for an accident caused by the act of one of its drivers in drawing across the road so as to obstruct a rival omnibus. It was held to be no defence that the company had issued specific instructions to its drivers not to race with or obstruct other vehicles: the driver whose conduct was in question was engaged to drive and the act which did the mischief was a negligent mode of driving for which his employers must answer, irrespective of any authority or of any prohibition.³⁹ So in *Canadian Pacific Ry. Co. v. Lockhart*⁴⁰ the employers were held liable where their servant in disobedience to orders not to use uninsured motor-cars drove his own uninsured car whilst on a journey for the purpose of the work he was employed to do. But in *Twine v. Bean's Express*⁴¹ the employers had expressly instructed their driver not to allow unauthorised persons to travel on their vehicles and affixed a notice to this effect in the driver's cab. Despite this the driver gave a lift to a person who was

been liable if their secretary had acted negligently instead of fraudulently?
See 177 L.T.J. 219.

³⁵ *Slingsby v. District Bank* [1932] 1 K.B. 544.

³⁶ *Bradford Building Society v. Borders* [1941] 2 All E.R. 205, 211.

³⁷ This sentence was cited with approval by Birkett L.J. in *London County Council v. Cattermole (Garages), Ltd.* [1958] 1 W.L.R. 997, at 1005.

³⁸ (1862) 1 H. & C. 526.

³⁹ "The law casts upon the master a liability for the act of his servant in the course of his employment; and the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability": *per* Willes J. at 539.

⁴⁰ [1942] A.C. 591.

⁴¹ [1946] 1 All E.R. 208; *affd.* 175 L.T. 131.

killed by reason of the driver's negligence. The Court of Appeal held that he was acting outside the scope of his employment and accordingly his employers were not liable. The act of giving a lift to an unauthorised person is not merely a wrongful mode of performing an act of the class which the driver is employed to perform but the performance of an act of a class which he was not authorised to perform at all. The servants' act in such a case is merely "the personal expression of goodwill and kindness wholly unconnected with the method or course of performance of their duties or employment."⁴² It may be otherwise in the case of "a stray passenger, picked up by a driver to whom no contrary instruction had been given,"⁴³ or if the plaintiff could show that the defendants had acquiesced in their servant's breaches of his instructions.⁴⁴ Further illustrations are unnecessary; for in every case it is a question of fact whether a servant is acting within the scope of his employment.⁴⁵ "In these cases the first consideration is the ascertainment of what the servant was employed to do. The existence of prohibitions may, or may not, be evidence of the limits of the employment."⁴⁶ Prohibition is relevant in considering what the scope of the servant's employment was, and therefore in determining whether the wrongful act was or was not a mode of exercising that employment; but it is powerless to exclude an employer's liability for the wrongful acts of his servant within the sphere permitted to him. Where the servant is doing work which he is appointed to do, but does it in a way which his master has not authorised and would not have authorised, had he known of it, the master is nonetheless responsible.⁴⁷

§ 196. Wilful Wrongdoing by Servant

The liability of a master extends to frauds and other wilful wrongs, no less than to negligence and mistake. If his servant

⁴² *Reardon v. Attorney-General* [1954] N.Z.L.R. 978, 997.

⁴³ [1946] 1 All E.R. at 204, per Uthwatt J.

⁴⁴ *Conway v. Wimpey (George), Ltd.* [1951] 2 K.B. 266, 274-275. Cf. *Young v. Box (Edward), Ltd.* [1951] 1 T.L.R. 789. These cases show an alternative approach to the problem: the plaintiff in such a case is a trespasser on the defendants' vehicle (and none the less so because the driver may have induced him to believe he was not) and so unable to recover from the employers (as distinct from the driver).

⁴⁵ *Marsh v. Moors* [1949] 2 K.B. 208, 215.

⁴⁶ *C.P.R. v. Lockhart* [1942] A.C. at 600.

⁴⁷ *Goh Choon Seng v. Lee Kim Soo* [1925] A.C. 550, 554.

does fraudulently what he is employed to do honestly, the master must answer for the fraud. Thus in *Barwick v. English Joint Stock Bank*⁴⁸ the defendant bank was held liable for a fraudulent representation made to the plaintiff by the manager of one of the bank's branches in relation to the business under his control. It was long supposed that where the fraud or other wilful wrongdoing of the servant was committed for his own benefit and not on his master's behalf, his master was not responsible. It was, however, decided by the House of Lords in *Lloyd v. Grace, Smith & Co.*,⁴⁹ distinguishing *Barwick v. English Joint Stock Bank*,⁵⁰ that this was not so. The facts, as recounted by Lord Macnaghten,⁵¹ were that "in the office of Grace, Smith & Co., a firm of solicitors in Liverpool of long standing and good repute, the appellant, Emily Lloyd, a widow woman in humble circumstances, was robbed of her property. It was not much, just a mortgage for £450 bequeathed to her by her late husband, and two freehold cottages at Ellesmere Port which she had bought herself without legal assistance for £450 after her husband's death. But it was all she had; and after the order of the Court of Appeal reversing a decision in her favour pronounced by Scrutton J., who tried the case with a special jury, she was compelled to appeal to this House as a pauper."⁵² The "robbery" was committed by the solicitor's managing clerk, who had induced Mrs. Lloyd, a client of the firm, to transfer a mortgage to him by fraudulently misrepresenting the nature of the deed of assignment, and thereupon obtained and misappropriated the mortgage moneys. The solicitor was held liable to his client for the fraud although it was committed solely for the benefit of the fraudulent servant himself. The House held that so long as a servant is acting within the scope of the employment entrusted to him, his employer is liable for all frauds committed by that servant, whether for the benefit of the employer or for his own profit. It has since been decided⁵³ that the employer is similarly liable even though the fraud involves a forgery and even

⁴⁸ (1867) L.R. 2 Ex. 259.

⁴⁹ [1912] A.C. 716.

⁵⁰ On this see Cross, *Precedent in English Law* (Oxford, 1961), 71-72.

⁵¹ "To generations who have passed their lives in the law his is truly *clarum et venerabile nomen*": *Public Trustee v. I. R. C.* [1960] A.C. 398, at 409, *per Viscount Simonds*.

⁵² [1912] A.C. at 727.

⁵³ *Uxbridge Permanent Benefit Building Society v. Pickard* [1939] 2 K.B. 248.

though the victim of the fraud is not a client but a third person who is damnified by relying on the apparent or ostensible authority possessed by the clerk.

Although the decision in *Lloyd v. Grace, Smith & Co.*⁵⁴ came as a surprise at the time it was given, the facts in these cases would seem to be covered by the principle enunciated by Sir John Holt C.J. in *Hern v. Nichols*,⁵⁵ one of the very earliest cases in which vicarious liability was imposed in English law: "Seeing somebody must be a loser by this deceit, it is more reason that he, that employs and puts a trust and confidence in the deceiver, should be a loser than a stranger."⁵⁶ Where, however, there is no authority, actual or apparent, the master will not be liable for the wilful and deliberate torts of his servant. In such a case no question arises of any actual or ostensible authority on the faith of which a third person has changed his position.⁵⁷

Malice of servant

The mere fact that the servant has acted out of personal vengeance or malice or resentment or by way of a practical joke⁵⁸ will not exonerate the master provided that the act was within the scope of his employment. So when a patron of a dance-hall was assaulted twice by a steward in the course of ejecting unruly persons, first inside the hall and secondly outside it, it was held that the second assault, as distinct from the first, was an act of private retribution for which the employers were not liable.⁵⁹

But although a principal is liable for the fraud or malice of his agent, an innocent agent is not liable for the fraud or malice of his principal—there is no doctrine of *respondeat inferior*.⁶⁰

⁵⁴ [1912] A.C. 716.

⁵⁵ (c. 1700), 1 Salk. 289.

⁵⁶ The statement of the effect of *Lloyd v. Grace, Smith & Co.* has been somewhat recast since the eighth edition, though the statement there given was referred to without disapproval by Hilbery J. in *British Railway Traffic Co. v. Roper* (1939) 162 L.T. 217, 221.

⁵⁷ For an example, see *Joseph Rand, Ltd. v. Craig* [1919] 1 Ch. 1.

⁵⁸ *Hudson v. Ridge Manufacturing Co., Ltd.* [1957] 2 Q.B. 348.

⁵⁹ *Daniels v. Whetstone Entertainments, Ltd.* [1962] 2 Lloyd's Rep. 1, 10.

See also *Warren v. Henleys, Ltd.* [1948] 2 All E.R. 935.

⁶⁰ *Eggar v. Chelmsford (Viscount)* [1965] 1 Q.B. 248.

Bailments

The liability of a master for thefts committed by his servants of property bailed to the master or otherwise committed to his charge is a matter of doubt. It used to be supposed that a bailee is not responsible for the loss of the property by theft, even though the thief is the bailee's own servant, unless the bailee has given occasion for the theft by his own negligence or by that of some other servant employed to take care of the property. So in *Cheshire v. Bailey*⁶¹ the plaintiff, a silversmith, hired from the defendant a brougham, horse, and man for the purpose of driving the plaintiff's traveller about London with samples of the plaintiff's wares to be shown to customers. While the traveller was temporarily absent in the course of his business, the coachman, acting in collusion with thieves, drove the brougham to a place where the samples were stolen by the thieves. It was held by the Court of Appeal that the defendant, the coachman's employer, was not liable, as the coachman in so conspiring with thieves was no longer acting within the scope of his employment. In the earlier case of *Abraham v. Bullock*,⁶² on the other hand, the facts were exactly the same, save that the coachman, in permitting the theft, was acting negligently and not fraudulently; and it was held that his employer was liable. Since the decision of the House of Lords in *Lloyd v. Grace, Smith & Co.*⁶³ this distinction is apparently immaterial. It would appear (unless the general principle of an employer's liability for torts is modified in cases of bailment by the express or implied terms of the contract) that the responsibility of the bailee must depend on whether the servant by whom the theft is committed is one to whom the charge or custody of the thing stolen has been entrusted by his master. If such a servant steals the thing entrusted to him, he is acting nevertheless in the course of his employment—he is doing fraudulently what he is employed to do honestly—and his employer is liable.⁶⁴ But if the theft is committed by a servant to whom the property has not been entrusted, the theft is outside the scope of his employment, and the master is not responsible

⁶¹ [1905] 1 K.B. 237.

⁶² (1902) 86 L.T. 796.

⁶³ [1912] A.C. 716.

⁶⁴ The employment of a known thief may be a fundamental breach disentitling the employer from relying on an exemption clause: *John Carter, Ltd. v. Hanson Haulage (Leeds), Ltd.* [1965] 2 W.L.R. 553.

unless he has been negligent in the selection of the servant or the theft has been induced by his own negligence or by the negligence of some other servant to whom the charge of the property has been committed.⁶⁵ But in 1965 the Court of Appeal ^{65a} over-ruled *Cheshire v. Bailey*.

Improper use of master's property

The same principle applies when a servant makes unauthorised use not amounting to larceny of property which has been bailed to his employer—for example, a garage-hand who takes out for his own purposes a motor-car left with his employers for repair and damages it. In such a case, it will be no defence to an action by the bailor for the employer to plead that the servant was “on a frolic of his own”⁶⁶ if that servant was one to whom the charge or custody of the car has been entrusted, for in such a case there will have been a breach of the implied term of the bailment to use reasonable care in the custody of the goods.⁶⁷ But there can be little doubt that such a plea would be a good defence if the plaintiff was a bystander or other person injured by the servant's careless driving; in such a case the bailment is irrelevant.⁶⁸ For a master is not responsible for the negligence of his servant in the unauthorised use of his master's property for the servant's own purposes. This rule has been applied on many occasions when harm has been done by the negligent driving of servants while using their masters' conveyances for their own ends, as when they borrow their employers' motor-vehicle⁶⁹ or railway engine⁷⁰ in order to go home for lunch.

⁶⁵ It is not clear why the coachman in *Cheshire v. Bailey* was not doing dishonestly what he was employed to do honestly, but that case was expressly approved by Lord Shaw in *Lloyd v. Grace, Smith & Co.* (at 741).

^{65a} *Morris v. C. W. Martin & Sons, Ltd.* (1965) 109 S.J. 451.

⁶⁶ *Joel v. Morison* (1884) 6 C. & P. 501, at 503, per Parke B.

⁶⁷ *Sanderson v. Collins* [1904] 1 K.B. 628; *Central Motors (Glasgow), Ltd. v. Cessnock Garage & Motor Co.*, 1925 S.C. 796; *Aitchison v. Page Motors, Ltd.* (1935) 154 L.T. 128.

⁶⁸ The preceding two paragraphs were cited with approval by Mr. Commissioner Fenton Atkinson, q.c., in *Adams (Durham), Ltd. v. Trust Houses, Ltd.* [1960] 1 Lloyd's Rep. 380, at 385–386.

⁶⁹ See, e.g., *Hilton v. Thomas Burton (Rhodes), Ltd.* [1961] 1 W.L.R. 705; *Jones v. McKie and Mersey Docks and Harbour Board* [1964] 2 All E.R. 842.

⁷⁰ *Ministry of Supply v. British Railways* (1956), unreported, Notts. Assizes.

On the same principle, a master is not responsible for the negligence of his servant while engaged in doing something which he is permitted to do for his own purposes, but not employed to do for his master. I am liable only for what I employ my servant to do for me, not for what I allow him to do for himself. If I permit my servant for his own ends to drive my car, I am not liable for his negligence in doing so.⁷¹ In this respect he is not my servant, but a mere bailee to whom I have lent my property; and there is no more reason why I should answer for his conduct in such a matter than reason why I should answer for that of my friends or my children to whom, without personal negligence on my own part, I lend or entrust property that may be made the instrument of mischief.⁷²

§ 197. The Doctrine of Common Employment

Formerly a master was not responsible for negligent harm done by one of his servants to a fellow-servant engaged in a common employment with him. This rule was abolished after many years of criticism⁷³ by the Law Reform (Personal Injuries) Act, 1948, but some account of its history and nature is necessary. The rule was first applied in *Priestley v. Fowler*,⁷⁴ and first definitely formulated in *Hutchinson v. York and Newcastle Ry.*⁷⁵ Hence it has been said that "Lord Abinger planted it, Baron Alderson watered it, and the Devil gave it increase."⁷⁶ The doctrine was based on a fictitious implied term in the contract of service to the effect that the servant agreed to run the risks naturally incident to his employment, and that one of these risks was that of harm due to the negligence of a fellow-servant. The doctrine became complex and subtle with the passing years. In particular, it could no longer be stated in the simple form that one servant could not claim damages from his master for the negligence of a fellow-servant. Two conditions

⁷¹ *Britt v. Galmoye* (1928) 44 T.L.R. 294.

⁷² The preceding four sentences were cited with approval by Schreiner J.A. in *Carter & Co. (Pty.), Ltd. v. McDonald*, 1955 (1) S.A. 202, 208.

⁷³ It was described by MacKinnon L.J. as "a doctrine which lawyers who are gentlemen have long disliked": *Speed v. Thomas Swift* [1943] K.B. 557 at 569. Yet a nationalised industry did not disdain the defence: *Harrison v. National Coal Board* [1951] A.C. 639.

⁷⁴ (1837) 8 M. & W. 1.

⁷⁵ (1850) 5 Ex. 343.

⁷⁶ *Kenny, Cases on Tort*, p. 90.

had to be fulfilled before the doctrine could apply: (1) The servant injured and the servant causing the injury must have been fellow-servants—i.e., they must be servants of the same master; (2) they must at the time of the accident have been engaged in a common work.⁷⁷

Curtailment and abolition ⁷⁸

The story of how the doctrine of common employment was gradually limited in scope and eventually abolished is an interesting one. Legislation and judicial decision have combined with each other to complicate the story: the effect of neither can really be understood in isolation from the other.⁷⁸ Still, it is convenient to deal first with the changes made by statute. In 1880 the Employers' Liability Act abrogated the defence in a limited number of strictly defined cases.⁷⁹ Next the important decision of the Court of Appeal in *Groves v. Wimborne* (Lord)⁸⁰ made it plain that common employment was no defence when the cause of action was based on the breach of a statutory duty imposed on the employer.⁸¹ "From 1898 onwards it was firmly established that the workman had a remedy whenever his injuries resulted from a breach of the Factories Acts or similar legislation: and to such a claim neither common employment nor *volenti non fit injuria* afforded a defence."⁸² But it might be difficult for the workman to show that his injury was due to the negligence of anyone at all or even to discover what its cause might have been. So the Workmen's Compensation Act, 1897, adopted a new approach. The Act provided compensation for a workman injured in the course of his employment even though no negligence on the part of his employer or anyone else could be shown. The basis of the workman's claim was not negligence or

⁷⁷ See *Lancaster v. L.P.T.B.* [1948] 2 All E.R. 796. It is appropriate that the *Lancaster* case should have been argued on the very day on which the Law Reform (Personal Injuries) Bill received the Royal Assent.

⁷⁸ Frank, "Employers' Liability in Great Britain" (1953) 18 *Law and Contemporary Problems* 390; Howells, "*Priestley v. Fowler* and the Factory Acts" (1963) 26 M.L.R. 367.

⁷⁹ If the respondents in *Smith v. Baker & Sons* [1891] A.C. 325 (see above, § 14) had been successful, workmen would have been deprived of even the limited protection given by the Act of 1880.

⁸⁰ [1896] 2 Q.B. 402.

⁸¹ See the interesting (extra-judicial) remarks of Lord Reid in 248 H.L. Deb. 5s., col. 1338.

⁸² Munkman, *Employers' Liability*, p. 19.

fault but accident. It was assumed that the employer would insure against his liability and pass on the premium to the public by way of increased prices.⁸³ The scope of the Act was widened by subsequent legislation which was consolidated by the Workmen's Compensation Act, 1925. There were, however, several disadvantages. (1) The rates of compensation were related, not to the actual needs of the workman but to his loss of earning capacity. (2) Although most employers insured against liability, there was no obligation to do so and hence no guarantee that compensation would be paid. (3) The compensation could be commuted into a lump sum and workmen were often tempted to make improvident bargains of this kind. (4) Administration costs were excessive. (5) The settlement of disputes had not proved as cheap and easy as the framers of the Act had hoped. A case might be fought bitterly from the county court to the House of Lords. By 1946 the standard textbook on the Acts had run through 37 editions and cited over 8,000 cases. (6) The employer's liability to pay compensation out of his own resources did not fit easily into the scheme of compulsory insurance organised by the State which had developed since the National Insurance Act, 1911.

§ 198. The National Insurance Acts, 1946 to 1963

The whole matter was fully reviewed during the Second World War. The National Insurance Act, 1946, and the National Insurance (Industrial Injuries) Act, 1946, came into force on July 5, 1948.⁸⁴ Details of these Acts must be sought in the appropriate treatises, but a brief account of the latter may be given here. Section 1 (1) states that "Subject to the provisions of this Act all persons employed in insurable employment shall

⁸³ It is worth noting that Lord Bramwell in his dissenting speech in *Smith v. Baker & Sons* [1891] A.C. 325, at 340, said: "I am not certain it would not be a good thing to give a person injured as the plaintiff was a right to compensation, perhaps from the state, even where there was no blame in the master; even where there was blame in the servant. Men would not wilfully injure themselves, and then compensation would be a part of the cost of the work." This point (made, incidentally, by one who was a sturdy exponent of Victorian individualism) has been developed at much greater length by some modern writers on torts: see above, § 8.

⁸⁴ As amended they may be cited together as the National Insurance Acts, 1946 to 1963. A valuable textbook on each Act has been produced by Potter & Stansfield.

be insured in manner provided by this Act against personal injury caused by accident arising out of and in the course of such employment."

(1) Insurable employment

The Act covers all those employed in Great Britain under a contract of service or apprenticeship, written or oral, express or implied. There is not (as there was under the Workmen's Compensation Acts) any upward limit on the amount of earnings. This very large class is the main category of insured persons.

(2) Risks insured against

A person in insurable employment is entitled to benefit if he suffers personal injury arising out of and in the course of his employment, and he is also insured against any prescribed disease or prescribed personal injury not so caused by accident but which is a disease or injury due to the nature of that employment. The terms "personal injury," "accident," and "arising out of and in the course of such employment" were taken over from the Workmen's Compensation Acts. They had been the subject of a vast number of judicial decisions, and it was thought "better to stick to the devil we know than to fly to the devils we know not of."⁸⁵ Once the insured person has shown that the accident arose in the course of the employment he is relieved (in the absence of evidence to the contrary) from proving that it arose out of the employment. The Act specifically brings within the employment three cases which would normally be outside it: (1) If the insured person at the time of the accident is acting in breach of any rules of his employment, statutory or otherwise, or is acting without his employer's instructions the accident is deemed to have arisen out of and in the course of his employment, provided (i) the accident would be deemed to have so arisen if there had not been any such breach, and (ii) the act is done for the purpose of and in connection with the employer's trade or business. (2) Where the insured person is injured while travelling to or from work in his employer's transport. (3) Where the insured person suffers an accident while in or about premises at which he is employed for the purposes of his employer's

⁸⁵ 414 H.C.Deb. (5th ser.), col. 270.

business when aiding in an emergency (actual or supposed) at those premises persons who are (or are thought to be) imperilled, or is acting to avert or minimise serious damage to property.⁸⁶

(3) Contributions

Half are paid by the employer and half by the workman. A further contribution of one-fifth of the aggregate amount provided by the employers and insured persons is provided by Parliament.

(4) Benefits

The term compensation is not now used. Benefits (which are now related to the degree of disability suffered and not to loss of earning power) are of three kinds: (i) injury benefit, (ii) death benefit, and (iii) disablement benefit.

(5) Administration

This has been taken away from the ordinary courts and vested in the Ministry of National Insurance. Claims to benefit are made in the first instance to the local insurance officer; from him an appeal may be taken to a local appeal tribunal and thence to the Industrial Injuries Commissioner (a barrister of ten years' standing).

§ 199. Master's Common Law Duties to Servants⁸⁷

Before the Employers' Liability Act, 1880, the courts themselves intervened to mitigate the severity of the doctrine of common employment. The doctrine went no further than to imply in the contract of employment a term by which the servant agreed to bear the risks arising from the negligence of a fellow-servant who had been selected with due care by the master. The doctrine did not mean that the servant impliedly agreed to hold the master immune from liability for the consequences of the master's own personal negligence. The common law has always held the master to be under an obligation to take reasonable care for his servant's safety. The nature of the duty was expounded

⁸⁶ See the rescue cases at common law, above, § 14.

⁸⁷ See Fricke, "Some Aspects of the Employees' Common Law Remedy" (1980) 1 *Tasmanian University Law Review* 883.

by Lord Herschell in *Smith v. Charles Baker & Sons*⁸⁸ in words which have been consistently cited with approval: "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk." Those words "are important both in prescribing the positive obligation and in negating by implication anything higher."⁸⁹

Four points may be made about the scope and nature of the duty which they impose on the employer. First, there are several judicial warnings against interpreting the duty too strictly.⁹⁰ Secondly, the duty in question is apparently capable of being pleaded either in contract or in tort. There are conflicting judicial dicta on the matter.⁹¹ In some cases it may be advantageous to sue in contract,⁹² in others in tort.⁹³ The normal practice is to sue in tort. Thirdly, the duty is imposed upon the master himself, and if he entrusts the performance of it to another instead of performing it himself he is liable for the negligence of that other. The duty remains personal to the master even though he is obliged by statute to entrust to a duly qualified person the task of providing a safe system of work and is forbidden to interfere in the working himself: "It is the obligation which is personal to him, and not the performance."⁹⁴ But this does not mean that an employer who buys from a reputable source a tool with a latent defect not discoverable by reasonable care which injures an employee has failed to take

⁸⁸ [1891] A.C. 325, at 362.

⁸⁹ *Davie v. New Merton Board Mills, Ltd.* [1959] A.C. 604, 620. Though the duty is not absolute "a high standard is exacted": *Winter v. Cardiff R.D.C.* [1950] 1 All E.R. 819, at 822, *per* Lord Porter. But see *Daniel (C. E.), Ltd. v. Velekou* [1955] N.Z.L.R. 645.

⁹⁰ *Pease v. B. I. S. N. Co., Ltd.* [1953] 1 Lloyd's Rep. 207. *Cf. Chattaway v. Maltby & Sons, Ltd.* [1954] 2 Lloyd's Rep. 495; *Buckingham v. Daily News, Ltd.* [1956] 2 Q.B. 534.

⁹¹ So the House of Lords has said both that the duty is tortious (*Davie v. New Merton Board Mills, Ltd.* [1959] A.C. 604) and that it is contractual (*Lister v. Romford Ice Co., Ltd.* [1957] A.C. 555). The various dicta are surveyed in *Matthews v. Kuwait Bechtel Corporation* [1959] 2 Q.B. 57.

⁹² *e.g.*, where the wrong has been committed out of the jurisdiction: *Matthews v. Kuwait Bechtel Corporation* [1959] 2 Q.B. 57. See above, § 3.

⁹³ *e.g.*, where the claim is in a county court: see above, § 3.

⁹⁴ *Wilson & Clyde Coal Co. v. English* [1938] A.C. at 81, *per* Lord Wright.

reasonable care for his safety.⁹⁵ There might be liability if the tool had been made to the employer's defective design,⁹⁶ or if it appeared that the defect was due to the careless workmanship of an independent contractor of the employer.⁹⁷ But it is impossible "to regard as an independent contractor with an employer a manufacturer with whom he never contracted, of whom he may never have heard and from whom he may be divided in time and space by decades and continents."⁹⁸ Fourthly, it has been customary ever since *Wilsons and Clyde Coal Co. v. English*⁹⁹ to expound these duties under the three-fold heading of the provision of a competent staff of men, adequate material, and a proper system of work. But there are not in truth three duties but only one duty.¹ It is only for convenience of exposition that the simple duty to take reasonable care is regarded as having three different facets.

(1) Competent staff of men

This duty still exists, though it is usually of little importance since the abolition of the defence of common employment has made an employer liable for the negligence of the plaintiff's fellow-servants.²

(2) Proper plant, appliances and premises

"The providing of proper plant," said Sir Arthur Channell in *Toronto Power Co. v. Paskwan*,³ "as distinguished from its subsequent care, is especially within the province of the master rather than of his servants. . . . It is true that the master does not warrant the plant, and if there is a latent defect which could not be detected on reasonable examination, or if in the course of working plant becomes defective and the defect is not brought to

⁹⁵ *Davie v. New Merton Board Mills Ltd.* [1959] A.C. 604.

⁹⁶ [1959] A.C. at 626, 648.

⁹⁷ See below, § 202.

⁹⁸ [1959] A.C. at 620, *per* Viscount Simonds.

⁹⁹ [1938] A.C. 57.

¹ *Wilson v. Tyneside Window Cleaning Co.* [1958] 2 Q.B. 110. See below, p. 679.

² But see *Hudson v. Ridge Manufacturing Co., Ltd.* [1957] 2 Q.B. 348, where employer was personally, not vicariously, liable, for fellow-servant addicted to practical jokes.

³ [1915] A.C. 734, at 738. ("One of the most eminent judges before whom I ever had the good fortune to practise": *R. v. Kritz* [1950] 1 K.B. 82, at 87, *per* Lord Goddard C.J.)

the master's knowledge and could not by reasonable diligence have been discovered by him, the master is not liable, and further, a master is not bound at once to adopt the latest improvements and appliances." Although the duty is not only to provide proper plant but also to maintain it, it is not broken by a merely temporary failure to keep in order or adjust the plant or appliances. The duty was held to be broken when a large electric fan, the tips of whose blades revolved at 120 m.p.h., was placed unfenced on the floor of a factory and set in motion.⁴

The duty to provide and maintain safe premises is similar. It extends as well to the servant's working place as to the means whereby the servant has to reach it.⁵ The duty is to make the place of work as safe as reasonable care and skill will permit⁶; it is thus higher than the duty owed by an invitor to an invitee, but it is probably not as high as the obligation under the Factories Act, 1961, to provide safe premises and means of access.⁷ The proper approach can be seen in *Latimer v. A. E. C., Ltd.*⁸ The respondents employed more than four thousand persons in their fifteen-acre factory at Southall. One August day an exceptionally heavy rainstorm caused the floor to be flooded with water. The water eventually subsided but an oily film remained on the surface of the floor. The respondents did their best to get rid of the film before the plaintiff came on duty with the night-shift but he slipped and was injured. The House of Lords held that the respondents were not in breach of their duty. The degree of risk involved was not sufficiently great to justify the trial judge's finding that the works should have been closed down until the danger had disappeared.

(3) Safe system of work

The duty covers all acts which are normally and reasonably incidental to the day's work.⁹ The most valuable analysis of

⁴ *Thurogood v. Van den Berghs, Ltd.* [1951] 2 K.B. 537.

⁵ *Hurley v. Sanders & Co., Ltd.* [1955] 1 All E.R. 833, 835 (this point is not reported in [1955] 1 W.L.R. 470).

⁶ *Naismith v. London Film Productions, Ltd.* [1939] 1 All E.R. 794, 798.

⁷ *Latimer v. A.E.C., Ltd.* [1953] A.C. 613, 658.

⁸ [1953] A.C. 643. See also *Thomas v. Bristol Aeroplane Co.* [1954] 1 W.L.R. 694.

⁹ *Davidson v. Handley Page, Ltd.* [1945] 1 All E.R. 235 (washing teacups).

the scope of the duty is to be found in the judgment of Lord Justice-Clerk Aitchison in *Wilson & Clyde Coal Co. v. English*¹⁰: "Broadly stated, the distinction is between the general and the particular, between the practice and method adopted in carrying on the master's business of which the master is presumed to be aware and the insufficiency of which he can guard against, and isolated or day-to-day acts of the servant of which the master is not presumed to be aware and which he cannot guard against; in short, it is the distinction between what is permanent or continuous on the one hand and what is merely casual and emerges in the day's work on the other hand." For such a casual departure from the system the employer is not liable. It has been made plain¹¹ that the duty to provide a safe system may arise in relation to an isolated task which may never have to be repeated in exactly the same way—e.g., the loading and unloading of ships. The duty owed is to men of ordinary phlegm and fortitude, not to those who are unreasonably apprehensive¹²; but it is also owed to each servant as an individual. So all the circumstances relevant to that servant must be considered by a prudent employer, including the gravity of the injury which he may suffer if an accident occurs.¹³

As the standard of care required is no higher than that to be expected of an ordinary prudent employer the defendant will usually succeed if he shows that his system of protection is in accordance with the general practice in that particular trade,¹⁴ or with the relevant statute or statutory regulations.¹⁵ One common difficulty arises from the fact that men often disregard a system which has been established for their own protection. Their folly may be due either to inexperience or over-confidence. The employer must then consider the situation and do what is reasonable to ensure that a suitable system of protection is kept in operation: he cannot expect his workmen to lay down

¹⁰ 1936 S.C. 883, at 904.

¹¹ *Speed v. Thomas Swift & Co.* [1943] K.B. 577. In *Colfar v. Coggins & Griffith (Liverpool), Ltd.* [1945] A.C. 197, 202, Lord Simon L.C. said "the judgments of Lord Greene M.R. and his colleagues appear to me to carry the analysis of 'system of working' to the furthest point that can be reached."

¹² *Lawrence v. Daily Mirror Newspaper, Ltd.* (unreported), 1954 C.A. 344.

¹³ *Paris v. Stepney Borough Council* [1951] A.C. 367.

¹⁴ See above, § 89.

¹⁵ See above, § 101.

and operate a system for themselves. "Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a boardroom with the advice of experts. They have to make their decisions on narrow window sills and other places of danger, and in circumstances in which the dangers are obscured by repetition."¹⁶ Thus in *General Cleaning Contractors, Ltd. v. Christmas*¹⁷ the House of Lords held that it was not a safe system to employ window-cleaners to work outside high self-locking windows on a sill 6½ inches wide and 27 feet above ground without giving them any orders to keep one sash open or any appliance to prevent both sashes closing. The case shows clearly that in cases where perils are involved, which thought or planning might avoid or lessen, it may not be enough for the employer to entrust that thought or planning to the skill and experience, however great, of the man who carries out the work, since throughout there is always the underlying duty on the employer to take reasonable steps for the servant's safety.¹⁸

But there certainly are cases in which an employer is entitled to rely on a skilled man being sensible enough to avoid a danger of which he has been warned.¹⁹ The relationship between employer and skilled workman is not equivalent to that of a nurse and imbecile child,²⁰ or matron and patient,²¹ or schoolmaster and pupil.²² The common law does not require employers to refuse to employ people who are willing to work with them simply because they think it is not in that person's best interests to do the work.²³ Finally, once a condition of danger has been established, the onus shifts on to the employer to satisfy the court that he has taken reasonable care for his servant's safety.²⁴ The plaintiff is not obliged in every case to plead and prove an alternative system of work which would have been safe; in some

¹⁶ *General Cleaning Contractors, Ltd. v. Christmas* [1958] A.C. 180, at 189, per Lord Oaksey.

¹⁷ [1958] A.C. 180. See also *Barcock v. Brighton Corporation* [1949] 1 K.B. 339, 348 ("A system of work is not devised by telling a man to read the regulations and not to break them.")

¹⁸ *Jenner v. Allen West & Co., Ltd.* [1959] 1 W.L.R. 554, 561.

¹⁹ See *Qualcast (Wolverhampton) Ltd. v. Haynes* [1959] A.C. 743.

²⁰ *Smith v. Austin Lifts, Ltd.* [1959] 1 W.L.R. 100, 105.

²¹ *Haynes v. Qualcast, Ltd.* [1958] 1 W.L.R. 225, 230.

²² *Withers v. Perry Chain Co., Ltd.* [1961] 1 W.L.R. 1314, 1320.

²³ *Withers v. Perry Chain Co., Ltd.* [1961] 1 W.L.R. 1314.

²⁴ *McDonald v. British Transport Commission* [1955] 1 W.L.R. 1323.

cases it may be prudent for him to do so,²⁵ but in others it may be enough for him to allege that the system provided was dangerous and that a prudent employer would have done better.²⁶

Contributory negligence

It must be remembered that a great deal of work which has to be done is dangerous, and if it is not really practicable for the master to diminish or eliminate the danger then the risk of it is a necessary incident of the employment and a risk which the servant is paid to take.²⁷ Again, a servant who is aware that the work is dangerous and knows of the precautions which should be taken to avert the danger but yet does nothing may be guilty of contributory negligence and have to bear some of the loss himself. In actions under the Factories Acts the courts have adopted a lenient standard by which to judge whether the workman is guilty of contributory negligence: for as the purpose of imposing the absolute statutory obligation is to protect the workman against those very acts of inattention which may constitute contributory negligence, too strict a standard would defeat the object of the statute. But this doctrine cannot be used so as to require any modification in the standard of care required of a workman in a simple case of common law negligence, where there is no evidence of repetitive work being performed under strain or for long hours at dangerous machines.²⁸ Still, if a skilled man adopts a dangerous course of conduct not for the sake of saving himself trouble but primarily in order to get on with his employer's business the courts will be slow to put blame on him.²⁹

Servant working on premises of third party

The protection afforded by the law to one who is directed by his employer to work on premises occupied by a third party is not as clear as might be wished. First, the servant may possibly have a claim against some other contractor working on the premises who by his misfeasance has created a source of danger.³⁰

²⁵ *Vickers v. B.T.C. Docks Board* [1964] 1 Lloyd's Rep. 275.

²⁶ *Dixon v. Cementation Co., Ltd.* [1960] 1 W.L.R. 746.

²⁷ *Hurley v. Sanders & Co., Ltd.* [1955] 1 All E.R. 893, 896.

²⁸ *Staveley Iron & Chemical Co., Ltd. v. Jones* [1956] A.C. 627.

²⁹ *Machray v. Stewarts and Lloyds, Ltd.* [1964] 3 All E.R. 716.

³⁰ See above, § 114.

Secondly, it may be possible for him to establish that the occupier is in such close control of the situation as to have become his temporary employer, so as to owe him the duty which we have already expounded.³¹ But at present the courts do not favour such claims.³² Thirdly, the servant will be a lawful visitor of the occupier and so will be entitled to the common duty of care under the Occupiers' Liability Act, 1957.³³ It should be noted that until the common law was altered by the Occupiers' Liability Act, 1957, the rule was that an invitee who continued his work or activities with knowledge of the danger which ultimately caused him injury was without remedy against the occupier.³⁴ So in order to safeguard workmen, it was held that a master who sent his men out to work on another's premises was still subject to his common law obligation to take reasonable care for their safety by providing a safe system of work on those premises,³⁵ as distinct from seeing that the premises themselves were safe.³⁶ But fine distinctions are now to be avoided: the three headings under which it is customary to consider the liability of a master to his servant are really only manifestations of the fundamental duty to take such care as is reasonable in the circumstances. As Holroyd Pearce L.J. said in *Wilson v. Tyneside Window Cleaning Co.*³⁷: "Whether the servant is working on the premises of the master or on those of a stranger, that duty is still the same; but as a matter of common sense its performance and discharge will probably be vastly different in the two cases. The master's own premises are under his control: if they are dangerously in need of repair he can and must rectify this fault at once if he is to escape the censure of negligence. If, however, a master sends his plumber to mend a leak in a respectable private house, no one could hold him negligent for not visiting the house himself to see if the carpet in the hall creates a trap. Between these two extremes are countless possible examples in

³¹ Above, § 198.

³² *Savory v. Holland, Hannen, and Cubitts (Southern), Ltd.* [1961] 1 W.L.R. 1158.

³³ See above, Chap. 11.

³⁴ *London Graving Dock Co., Ltd. v. Horton* [1951] A.C. 737.

³⁵ *General Cleaning Contractors, Ltd. v. Christmas* [1953] A.C. 180.

³⁶ *Cilia v. James (H.M.) & Sons (A Firm)* [1954] 1 W.L.R. 721. But see *Wilson v. Tyneside Window Cleaning Co.* [1958] 2 Q.B. 110, 124; *Wingfield v. Ellerman's Wilson Line, Ltd.* [1960] 2 Lloyd's Rep. 16.

³⁷ [1958] 2 Q.B. 110, at 121.

which the court may have to decide the question of fact." In some circumstances a warning of the danger may be enough³⁸; in other cases the employer may be obliged to take positive steps to protect the employee, and in such cases the fact that the servant knowingly incurs the risk only goes to the question of his contributory negligence.³⁹ The cases have produced the rather curious result⁴⁰ that a skilled man working on the premises of a third party is not very well protected. For the more skilled he is the less likely is he to be the temporary servant of the occupier, and if the latter is sued for breach of the common duty of care he can plead that he is entitled to expect that a skilled man will guard against the normal risks of his calling.⁴¹ It would seem to follow that if the person injured in such a case is an independent contractor and not a workman, he is without a remedy against anyone. For a householder is entitled to expect that a window-cleaner will take his own precautions against risks customarily incidental to his work, such as ill-balanced weights or loose plywood.⁴²

§ 200. Abolition of Common Employment

Such were the limitations imposed by statute and common law on the doctrine of common employment. It was abolished by the Law Reform (Personal Injuries) Act, 1948, with effect from July 5, 1948. Section 1 (8) of that Act provides that any provision contained in a contract of service or apprenticeship or agreement collateral thereto which would have the effect of excluding or limiting any liability of the employer in respect of personal injuries⁴³ caused to the person employed or apprenticed

³⁸ *Smith v. Austin Lifts, Ltd.* [1959] 1 W.L.R. 100, 117.

³⁹ *A. C. Billings & Sons, Ltd. v. Riden* [1958] A.C. 240; *Minto v. Great Northern Transport Co., Ltd.* [1959] N.Z.L.R. 749.

⁴⁰ See, e.g., *Savory v. Holland, Hannen and Cubitts (Southern), Ltd.* [1964] 1 W.L.R. 1158.

⁴¹ See above, § 107.

⁴² *Bates v. Parker* [1958] 2 Q.B. 231; *Smith v. Austin Lifts, Ltd.* [1959] 1 W.L.R. 100, 115. (Note that the employers in this case had on four different occasions warned the occupier that the premises were unsafe.)

⁴³ The doctrine never seems to have applied in cases of other torts (e.g., assault, defamation), but there is no reason to suppose its revival would be encouraged: *Chapman, Statutes*, p. 27.

by the negligence of persons in common employment⁴⁴ with him shall be void.

The Act also provides a solution for the problem of how far the right of action for damages for personal injuries should be affected by the provision of benefits under the National Insurance (Industrial Injuries) Act, 1946. It had been suggested⁴⁵ that an injured person should not have the same need met twice over and the question was considered by a departmental committee on alternative remedies.⁴⁶ The committee recommended that the injured person should not (as he was under the Workmen's Compensation Acts) be put to his election between damages and benefits, but was divided on the question how far the measure of damages should be affected by such benefits. The Act adopted a compromise solution. By section 2 (1), in an action for damages for personal injuries against an employer, there must in assessing the damages be taken into account,⁴⁷ against any loss of earnings or profits which has accrued or probably will accrue⁴⁸ to the injured person from the injuries, one-half of the value of any rights which have accrued or probably will accrue to him from the injuries in respect of industrial injury benefit, industrial disablement benefit, or sickness benefit for the five years from the accrual of the cause of action. The amount of the disablement benefit to be taken into account should be half of such proportion of the gratuity as the five-year period (or the unexpired period thereof) bears to the injured person's expectation of life, if the gratuity is for life, or to any less period specified for the duration of the gratuity.⁴⁹ The benefits to be taken into

⁴⁴ See *Smith v. British European Airways* [1951] 2 K.B. 893. The phrase "common employment" appears in the section, and for that reason alone it is still necessary to know something of the old law.

⁴⁵ In the Beveridge Report, 1942 (Cmd. 6404), which recommended the abolition of the right of action for personal injuries in these cases.

⁴⁶ Under Sir Walter Monckton (Cmd. 6860). Professor Unger says (10 Mod. L.R. 179) that the recommendation of the Beveridge Report "threatened the very existence of the law of tort." See also Friedmann, *Law in a Changing Society*, pp. 151-157.

⁴⁷ The court has no discretion in the matter, except in so far as it need not make an exact calculation but can take a round sum: *Flowers v. George Wimpey & Co., Ltd.* [1956] 1 Q.B. 78.

⁴⁸ See Chapman, *Statutes*, p. 81, for this.

⁴⁹ *Hultquist v. Universal Pattern and Precision Engineering Co., Ltd.* [1960] 2 Q.B. 467. The complex practical problems which may arise are carefully considered in (1960) 110 L.J.(N.) 649.

account are not restricted to those paid during the period of incapacity but include those paid after that period has ceased, even though paid as a result of a mistake on the part of the insurance officer.⁵⁰ This deduction is made from the total of the damages assessed before any deduction is made for contributory negligence, or, if the damages otherwise recoverable are limited by any Act or contract, from the damages as they would have been assessed apart from the limitation.

Recent changes

What effect have these changes had on the legal relationship of master and servant? First, it is plain that though the benefits payable under the National Insurance Acts, 1946 to 1963, are greatly superior to those provided by the Workmen's Compensation Acts, 1925 to 1943, there are still very many cases where a servant injured in the course of his employment will wish to institute proceedings at common law. "Perhaps the most-quoted case in the courts today" is *Wilsons & Clyde Coal Co. v. English*.⁵¹ For the damages awarded by the courts (even after the deductions described above have been made) will often exceed the benefits made available by the Ministry of National Insurance. Secondly, it seems that the three-fold obligation of *Wilsons'* case is now capable of being expressed more simply and truly as a duty to take reasonable care for the servant's safety.⁵² The reason for drawing a distinction between a failure to take reasonable care to provide proper plant and a safe system of work (for which the master was personally responsible) and an isolated act of negligence by a fellow-servant (for which the master was not) has disappeared with the defence of common employment itself. The master is now vicariously liable for all negligent acts of his servants committed in the course of their

⁵⁰ *Flowers v. George Wimpey & Co., Ltd.* [1956] 1 Q.B. 73. Cf. *Kelly v. Farrans, Ltd.* [1954] N.I. 41.

⁵¹ [1938] A.C. 57. The phrase is from Birkett, "Law and Social Change in Contemporary Britain" (1952) 15 M.L.R. 277, 279. See, too, the comments in *McLeod v. Bauer* (1951) 85 Ll.L.R. 125, 126; *Chattaway v. T. F. Maltby, Ltd.* [1954] 2 Lloyd's Rep. 424; *Knight v. Glen Line, Ltd.* [1954] 2 Lloyd's Rep. 392, and above, § 8.

⁵² See the remarks of Pearce L.J. in *Wilson v. Tyneside Window Cleaning Co., Ltd.* [1958] 2 Q.B. 110, 121, cited above, § 199.

employment and it seems irrelevant that the plaintiff is a fellow-servant and not a stranger.⁵³ This view has been adopted in Scotland⁵⁴ and is supported by a dictum of Lord Simon.⁵⁵ But the distinction between the duty owed by a master personally and the vicarious liability which rests upon him as master may become important if the wrong complained of has taken place abroad and the defendant is not resident within the jurisdiction—for example, where an English workman employed by a foreign corporation is injured while engaged on construction work in the Persian Gulf. For if the duty alleged to be broken is based on tort the plaintiff will be unable to obtain leave to serve the writ out of the jurisdiction; but if it is based on contract (as the master's personal duty has been held to be) he will be able to sue in England.⁵⁶

§ 201. Servant's Duties to Master

One who is under a contract of service owes to his employer a number of different duties:

(1) Duty to take reasonable care

There is an implied term in the contract of service that the servant will take reasonable care not only of his master's property entrusted to him but also generally in the performance of his duties.⁵⁷ It seems that this duty is to be thought of as an implied contractual obligation rather than as a particular example of the tort of negligence.⁵⁸ Hence if the servant breaks this obligation his employer has a cause of action for breach of

⁵³ The preceding three sentences were cited with approval by Slade J. in *Smallwood v. Lamport & Holt Lines, Ltd.* [1959] 2 Lloyd's Rep. 213, 225.

⁵⁴ *Lindsay v. Connell & Co.*, 1951 S.C. 281, 285.

⁵⁵ *Bristol Aeroplane Co. v. Franklin* [1948] W.N. 341. See also *Winter v. Cardiff R.D.C.* [1950] 1 All E.R. 819, 823. This may be the meaning of Lord Simonds' description of safe system of work as "the familiar though inapt phrase": *Paris v. Stepney B.C.* [1951] A.C. 367, 378. Lord Tucker objected to it on the ground that it "omits what is an essential element in the cause of action, viz., negligence": *General Cleaning Contractors, Ltd. v. Christmas* [1953] A.C. 180, 195. It must be admitted that the phrase is still used, both in statute (Mines and Quarries Act, 1954, s. 193), and in the cases.

⁵⁶ *Matthews v. Kuwait Bechtel Corporation* [1959] 2 Q.B. 57. See Jolowicz, Note, [1959] C.L.J. 163.

⁵⁷ *Century Insurance Co., Ltd. v. N.I.R.T.B.* [1942] A.C. 509, 519; *Lister v. Romford Ice & Cold Storage Co., Ltd.* [1957] A.C. 555.

⁵⁸ *Lister v. Romford Ice & Cold Storage Co., Ltd.* [1957] A.C. 555.

contract to recover damages for such loss as is not too remote a consequence of the breach. The damage which the master has suffered may be either physical⁵⁹ or financial—e.g., the sums which the master, as vicariously responsible for his servant's torts, has paid to third parties injured by such a tort committed in breach of the implied contractual obligation.⁶⁰ Thus in *Lister v. Romford Ice & Cold Storage Co., Ltd.*⁶¹ the appellant and his father were employed by the respondents. One day Lister junior, in the course of his duties as a lorry driver, knocked down Lister senior, who was acting as his mate. Lister senior recovered damages for his personal injuries from the respondents, as being vicariously liable for the tort of Lister junior. The respondents' insurers, in virtue of their right of subrogation and of an express term in the policy of insurance, then instituted proceedings against the appellant (in the name but without the knowledge of the respondents) to recover the damages and costs which had been paid to his father. The House of Lords, by a bare majority, held that the respondents, whose rights were of course neither greater nor less than if they had not been insured, were entitled to succeed. The House refused to accept the appellant's argument that a term should be implied in his contract of service to the effect that he was entitled to the benefit of any insurance taken out by his employers.

(2) Duty to indemnify at common law

The ancient rule of the common law (now abolished) that one wrongdoer could not seek indemnity or contribution from another⁶² was confined to cases in which the person seeking redress must be presumed to have known that he was committing an illegal act. If he were personally free from any blame, it seems that he could sue the other for redress. So an agent would be entitled to indemnity if he reasonably believed that the act was one which his principal could authorise. It seems clear on principle, also, that in all cases of vicarious liability the person

⁵⁹ In *Digby v. General Accident Fire and Life Insurance Corporation, Ltd.* [1948] A.C. 121, Miss Merle Oberon, the film actress, recovered £5,000 damages from her own chauffeur for injuries caused by his negligent driving.

⁶⁰ The implied obligation extends no further than those acts which the servant is actually employed to do: *Harvey v. O'Dell, Ltd.* [1958] 2 Q.B. 78.

⁶¹ [1957] A.C. 555.

⁶² See above, § 186.

held vicariously liable for the tort of another must have a right of indemnity as against that other. Thus a master who has paid for the negligence of his servant can doubtless sue that servant for indemnity.⁶³

(3) Statutory duty to provide indemnity or contribution

It has now been settled that as master and servant are joint tortfeasors the former is entitled to claim contribution or indemnity from the latter to such extent as the court thinks just and equitable in accordance with the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935.⁶⁴ Thus if the negligence of the employer himself (or one of his other servants) has contributed to the damage the employer will be able to recover only a contribution and not an indemnity.⁶⁵ Similar rules govern those cases in which a principal is liable for the torts of his independent contractors.⁶⁶ In practice an indemnity of 100 per cent. seems to be commonly given in the ordinary case of vicarious liability, even though the claim at common law fails for one reason or another.⁶⁷

§ 202. Liability for Independent Contractors "

The general rule is that although an employer is responsible for the negligence and other wrongdoing of his servant, he is not

⁶³ This sentence, in the slightly altered form in which it appeared in the 10th and 11th editions, was cited with approval in *Jones v. Manchester Corporation* [1952] 2 Q.B. 852; *Semtex, Ltd. v. Gladstone* [1954] 1 W.L.R. 945; *Romford Ice Co. v. Lister* [1956] 2 Q.B. 180 (on appeal see [1957] A.C. 555).

⁶⁴ The relevant cases are those cited in note 63 and *Davenport v. Commissioner for Railways* (1953) 53 S.R. (N.S.W.) 552. See also Jolowicz, "Right to Indemnity between Master and Servant" [1956] C.L.J. 101; *ibid.*, 22 M.L.R. 71, 189; Williams, "Vicarious Liability and Master's Indemnity" (1957) 20 M.L.R. 220. Some grave issues of policy are raised by these decisions and are discussed in the Report of an Inter-Departmental Committee (H.M.S.O., 1959; Gardiner, 22 M.L.R. 652), which discovered that there was "a gentleman's agreement" amongst insurance companies not to take advantage of the *Lister* case. The medical profession (always a strongly organised body) has already secured the consent of the Minister of Health to an agreement under which hospital authorities will invoke the Act against negligent doctor servants only when the doctor is not assisted by one of the professional medical defence societies: Circular H.M. 54 (32).

⁶⁵ As in *Jones v. Manchester Corporation* [1952] 2 Q.B. 852.

⁶⁶ *Burnham v. Boyer* [1936] 2 All E.R. 1165; *Daniel v. Rickett, Cockerell & Co., Ltd.* [1938] 2 K.B. 822.

⁶⁷ *Harvey v. O'Dell, Ltd.* [1958] 2 Q.B. 78.

⁶⁸ Chapman, "Liability for Contractors" (1934) 50 L.Q.R. 71; Williams, "Liability for Independent Contractors" [1956] C.L.J. 180.

responsible for that of an agent who is not a servant but an independent contractor. There are, however, certain cases in which an employer is liable for the acts of an independent contractor. Although the tendency of development is in the direction of extending rather than restricting this liability,⁶⁹ the advantages of departing from the traditional distinction are not very obvious.⁷⁰ The liability of the employer of an independent contractor, however, is not properly vicarious⁷¹: the employer is not liable for the contractor's breach of duty; he is liable because he has himself broken his own duty. He is under a primary liability and not a secondary one.⁷² Hence it is misleading to think of the law on this point as a general rule of non-liability subject to a more or less lengthy list of exceptions. The real question is whether the defendant is, in the circumstances of the particular case, in breach of a duty which he owes to the plaintiff. If the plaintiff proves such a breach it is no defence to say that another has been asked to perform it. This seems to be all that is meant by talk of "non-delegable duties." The relevant principles were thus summarised by Denning L.J.⁷³ "I take it to be clear law, as well as good sense, that, where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services. Lord Blackburn laid that down on many occasions: see *Tarry v. Ashton*⁷⁴; *Dalton v. Angus*⁷⁵ and *Hughes v. Percival*⁷⁶; and so have other great judges."

⁶⁹ *Honeywill & Stein, Ltd. v. Larkin Bros.* [1934] 1 K.B. 191, 197.

⁷⁰ This is clearly brought out by Williams, [1956] C.L.J. 180.

⁷¹ *Daniel v. Rickett, Cockerell & Co., Ltd.* [1938] 2 K.B. 322, 325.

⁷² It is hardly necessary to add that the contractor himself will normally be liable to the injured party.

⁷³ *Cassidy v. Ministry of Health* [1951] 2 K.B. 343, at 363.

⁷⁴ (1876) 1 Q.B.D. 314, 319.

⁷⁵ (1881) 6 App.Cas. 740, 829: "A person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it." See an example of an indemnity clause in *Hosking v. De Havilland Aircraft Co., Ltd.* [1949] 1 All E.R. 540, 542.

⁷⁶ (1883) 8 App.Cas. 443, 446.

When a duty exists

The main difficulty in this branch of the law is to discover when the law will impose such a duty. One thing can, however, be said with confidence: the mere fact that the work entrusted to the contractor is of a character which may cause damage to others unless precautions are taken is not sufficient to impose liability on the employer.⁷⁷ There are few operations entrusted to an agent which are not capable, if due precautions are not observed, of being sources of danger and mischief to others; and if the principal was responsible for this reason alone, the distinction between servants and independent contractors would be practically eliminated from the law.⁷⁸ If I employ a contractor to manufacture explosives for me, am I responsible if an explosion happens because of the negligence of his servants in the course of manufacture? ⁷⁹ Here, as elsewhere in the law of negligence, it is not enough to establish liability to show that a reasonable man could have foreseen damage as a result of the defendant's acts. It may be helpful if we draw a distinction between two classes of duties—(i) a duty to take reasonable care, and (ii) a duty to see that care is taken.⁸⁰

(i) Duty to take reasonable care

The normal duty imposed by the law of negligence is no higher than one of reasonable care. As always, it is a question of fact in each case whether reasonable care has been taken. But it is certainly material to consider whether what has to be done is something which forms part of the obligor's ordinary trade or business. If the act or process in question is one which involves technical skill or knowledge, then the ordinary man will discharge his duty by entrusting its performance to an apparently competent contractor.⁸¹ A good example is the duty owed by those who take motor-vehicles onto a highway. It is no more than a duty to take reasonable care to avoid injury to other users

⁷⁷ Some rather broad observations to this effect of Cockburn C.J. in *Bower v. Peate* (1876) 1 Q.B.D. 321, 326, were disapproved of by Lord Blackburn in *Hughes v. Percival* (1883) 8 App.Cas. 443, 446.

⁷⁸ The two preceding sentences were cited with approval by MacDonald J. in *Cape Breton v. Chappells, Ltd.* (1962) 36 D.L.R. (2d) 58, 73.

⁷⁹ Lords Buckmaster and Parmoor thought not in *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co.* [1921] 2 A.C. 465, 477, 491.

⁸⁰ See *The Pass of Ballater* [1942] P. 112, 117.

⁸¹ *Riverstone Meat Co. Pty., Ltd. v. Lancashire Shipping Co., Ltd.* [1960] 1 Q.B. 586, 580-582.

of the highway. So if the owner of such a vehicle entrusts its repair to an apparently competent contractor, he is not liable if, as a result of the contractor's careless work, a wheel comes off and injures a passer-by.⁸² Similarly, one who hires a cab, or employs another to carry goods (as distinct from driving animals) for him through the streets, is not responsible for the carelessness with which he does it.⁸³

On the other hand a carrier of goods by sea does not fulfil his statutory obligation to use due diligence if he employs a competent ship repairer and has his work inspected by a Lloyd's surveyor in the customary way.⁸⁴ So the principal may be liable when due care is not taken to see that the agent is properly qualified for the performance of the task so committed to him, or where proper instructions are not given to him in order to enable him to avoid the dangers incidental to the work.⁸⁵ For it is important not to give an undue advantage to the ignorant employer who confides all his affairs to independent contractors.⁸⁶

Exceptions

There are, however, two cases in which it was generally assumed until recently that an employer was liable for the defaults of his contractor, even though the obligation imposed on him belonged to the category of negligence rather than strict liability.

(a) *Duty to invitees.* Before the Occupiers' Liability Act, 1957, it seemed that an occupier was, in general, liable to his invitees under the rule in *Indermaur v. Dames* for the default of his independent contractor. The law was stated in these general terms by Lord Simon L.C. and Lord Wright in *Thomson v. Cremin*.⁸⁷ They were not given the opportunity of considering the earlier decision of the Court of Appeal in *Haseldine v.*

⁸² *Stennett v. Hancock* [1939] 2 All E.R. 578, 581 (which also decides that he is not obliged to inquire whether the repairer has done his work properly). But the contractor himself may well be liable under the principle in *Donoghue v. Stevenson* [1932] A.C. 562; see above, § 119.

⁸³ *Pinn v. Rew* (1916) 32 T.L.R. 451; *Wilson v. Hodgson's Kingston Brewery Co.* (1916) 85 L.J.K.B. 270.

⁸⁴ *Riverstone Meat Co. Pty., Ltd. v. Lancashire Shipping Co., Ltd.* [1961] A.C. 807.

⁸⁵ *Robinson v. Beaconsfield R.D.C.* [1911] 2 Ch. 188.

⁸⁶ *Sumner v. William Henderson & Sons, Ltd.* [1964] 1 Q.B. 450, 471.

⁸⁷ (1941) [1958] 2 All E.R. 1185, 1188, 1191-1192; [1956] 1 W.L.R. 108n. This case is also reported (*sub nom. Cremin v. Thomson*) in (1941) 71 Ll.L.R. 1.

Daw & Sons Ltd.,⁸⁸ which followed the orthodox principle in holding that an occupier is not liable when the performance of his duty requires technical skill or knowledge, and he has taken all reasonable care to select an expert having that skill or knowledge, and to follow his advice. In this case the occupier of property on which hydraulic lifts were in operation was held to have discharged his duty when he employed "a first-class firm of lift engineers" to inspect and report on them. But in *Woodward v. Mayor of Hastings*⁸⁹ the governors of a school were held liable when a contractor failed to brush snow away from the school steps and the plaintiff was in consequence injured. "The craft of a charwoman may have its mysteries, but there is no esoteric quality in the nature of the work which cleaning a snow-covered step demands."⁹⁰ As the question was not actually in issue in *Thomson v. Cremin*,⁹¹ the courts displayed a certain preference for distinguishing *Thomson v. Cremin* and instead following the decision in *Haseldine v. Daw & Sons, Ltd.*⁹² Now the Occupiers' Liability Act, 1957, s. 2 (4), puts the matter almost beyond doubt. It provides that where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair⁹³ by an independent contractor employed by the occupier, the occupier is not to be treated "without more" as answerable for the danger if in all the circumstances he had acted reasonably in choosing and supervising the contractor.

(b) *Master's duty to servants.* It has been said⁹⁴ that the

⁸⁸ [1941] 1 K.B. 688. It is unfortunate but scarcely surprising that each case should have been decided in ignorance of the other: argument in the H.L. had concluded on July 24, and judgment was delivered on October 20; judgment in the C.A. in *Haseldine v. Daw* was delivered on July 31. A badly drafted sentence on p. 563 of the 12th edition of this book misled Oliver J. in *Thompson v. Anglo-Saxon Petroleum Co., Ltd.* [1955] 2 Lloyd's Rep. 363 into saying that *Cremin* was decided before *Haseldine*.

⁸⁹ [1945] 1 K.B. 174. Similar cases are *Bloomstein v. Railway Executive* [1952] 2 All E.R. 418; *Hartley v. Mayoh & Co.* [1954] 1 Q.B. 388.

⁹⁰ [1945] 1 K.B. at 182, *per du Parc* L.J.

⁹¹ See *Davie v. New Merton Board Mills, Ltd.* [1959] A.C. 604, 644-645, 648-649.

⁹² See *Green v. Fibreglass, Ltd.* [1958] 2 Q.B. 245; *Lyons v. Nicholls* [1958] N.Z.L.R. 409.

⁹³ Note that the draftsman has omitted the words "or other like operation," which occur in the recommendation of the Law Reform Committee: Cmd. 9305, p. 34. See also above, § 109.

⁹⁴ *Paine v. Colne Valley Electricity Supply Co., Ltd.* [1938] 4 All E.R. 808, 807; *Marshment v. Bergstrom* [1942] 4 D.L.R. 1.

duty which a master owes to his servants to take reasonable care of their safety cannot be avoided by entrusting its performance to a contractor, at least if the duty is to be performed on the master's own premises, and would normally be so performed by one of his own servants, and the negligent workmanship is discoverable by reasonable inspection.⁹⁵ There has been only one direct decision to this effect,⁹⁶ and it is submitted that it is of doubtful authority because the abolition of the doctrine of common employment changed the mode of approach in this branch of the law.

There are, however, a mass of dicta in the difficult case of *Davie v. New Merton Board Mills, Ltd.*⁹⁷ In this case the House of Lords held that an employer who had bought a tool containing a latent defect not discoverable by any reasonable examination on his part from reputable suppliers who in turn had bought it from reputable manufacturers was not responsible to one of his workmen for injury caused by the defect.⁹⁸ The Law Lords emphasised that the duty which a master owed to his servant was no higher than a duty to take reasonable care; it was, indeed, a personal duty, but that did not mean that liability under it was strict. The decision, it has been said, shows that: "There is no longer the same sociological justification for pushing the personal liability doctrine to what may have been its logical conclusion. So now the tide has turned and the erosion has ceased. Generally when the tide turns, the scars of erosion are only too obvious and a good deal of débris is left stranded on the deserted shore. One can look only with unfeigned admiration at the salvage work in *Davie*, and the restoration of the water-front to much of its pristine purity."⁹⁹

⁹⁵ *Davie v. New Merton Board Mills, Ltd.* [1959] A.C. 604, 646.

⁹⁶ *Sumner v. William Henderson, Ltd.* [1964] 1 Q.B. 450 (revd. in C.A. on another point [1964] 1 Q.B. 472).

⁹⁷ [1959] A.C. 645. See Goodhart, "A Master's Liability for Defective Tools" (1958) 74 L.Q.R. 397; Webber, "Safety of Tools and Employer's Liability" [1959] C.L.P. 56.

⁹⁸ The plaintiff successfully pursued a claim for damages against the manufacturers under the principle in *Donoghue v. Stevenson* [1932] A.C. 562.

⁹⁹ *Sullivan v. Gallagher and Craig*, 1959 S.C. 243, at 258-259, per Lord Justice-Clerk Thomson. So employers who formerly operated departments for the manufacture of tools should now "be advised to hand over their toolmaking to a subsidiary company or to buy their tools in the market": Marven Everett, q.c., *arguendo*, in *Davie* [1958] 1 Q.B. at 216.

(ii) *Duty to see that care is taken*

In some cases the law imposes a duty irrespective of negligence. Liability is strict or absolute. Where the act which the contractor is employed to do is one of the kind which the employer does at his own peril—so that the existence of negligence is immaterial—it is no defence that the cause of the mischief was the negligence of an independent contractor by whose agency the act was done.¹ If an employer is under a duty to a person or class of persons, he is liable if that duty is not performed and damage thereby results, and cannot evade that liability by delegating the performance of the duty to an independent contractor. Whether there is such a duty will depend upon whether the employer as a reasonable man ought to foresee that the persons who suffer damage are likely to be affected by the performance of the independent contractor's acts,² provided that the case falls within one of the following recognised categories of duties. For we have seen that an employer is not responsible for the acts of his contractor merely because what is to be done by him may involve liability to others if done negligently.

(a) *Statutory duties.* When an absolute duty is laid by statute upon an individual or class of individuals, the performance of it cannot be delegated to an independent contractor to enable liability to be evaded.³ This principle applies whether the duty is owed to the public or only to a section of the public.⁴ The duties imposed by the Factories Act, 1961, to fence dangerous machinery⁵ and to provide safe means of access⁶ are of this kind, and so is the duty to take safety precautions required by the Building (Safety, Health and Welfare) Regulations, 1948.⁷ The courts are moving in the direction of holding that the duties imposed on hospital authorities by the National Health Service Act, 1946, are also of this character.⁸

¹ This sentence (together with others now omitted) was cited with approval by Havers J. in *Balfour v. Barty-King* [1956] 1 W.L.R. 779, 783.

² The last two sentences were cited with approval by Kellock J. in *Savage v. Wilby* [1954] 3 D.L.R. 204, 206-207.

³ *The Pass of Ballater* [1942] P. 112, 117.

⁴ *Mulready v. J. H. & W. Bell, Ltd.* [1953] 2 Q.B. 117.

⁵ *Groves v. Wimborne (Lord)* [1898] 2 Q.B. 402.

⁶ *Hosking v. De Havilland Aircraft Co., Ltd.* [1949] 1 All E.R. 540.

⁷ *Mulready v. J. H. & W. Bell, Ltd.* [1953] 2 Q.B. 117.

⁸ See above, § 192.

(b) *Creation of dangers in a highway.* Such a duty is imposed when a person employs a contractor to do in a highway (or perhaps in any place to which there is a public right of access or entry)⁹ some dangerous act other than the ordinary use of the highway for the purposes of passage or traffic, or when a person, having done such an act in the highway, delegates to a contractor the work of taking the precautions necessary to prevent mischievous consequences. Such employment or delegation is permissible only on the terms of warranting the public against the negligence of the contractor so entrusted with the work. This duty, which was well established at common law,¹⁰ is confirmed by the Highways (Miscellaneous Provisions) Act, 1961, section 1 (3), which provides that in action for damage arising from non-repair of highways or bridges it shall not be relevant to prove that the highway authority had arranged for a competent person to carry out or supervise the maintenance of the part of the highway to which the action relates, unless it is also proved that the authority had given proper instructions with regard to the maintenance of the highway and that he had carried out the instructions. This rule does not extend to dangers incidental to the ordinary use of a highway for purposes of traffic. He who creates or authorises a danger of this kind does not do so at his peril, but will answer only for his own personal negligence and for that of his servants.¹¹

(c) *Acts done under statutory authority.* It is sometimes said that where a person is employed to do an act which would be unlawful but for statutory authority the employer will be liable,¹² but as the cases in which this rule has been relied upon are also highway cases it is doubtful whether it has any independent existence.¹³

(d) *Cases of strict liability.* As we have seen,¹⁴ there is liability

⁹ *Pickard v. Smith* (1861) 10 C.B.(N.S.) 470 (railway station platform).

¹⁰ *Penny v. Wimbledon U.D.C.* [1899] 2 Q.B. 72; *Holliday v. National Telephone Co.* [1899] 2 Q.B. 392; *Hardaker v. Idle D.C.* [1896] 1 Q.B. 385; *Clements v. Tyrone C.C.* [1905] 2 I.R. 415, 542 (survey of authorities by Palles C.B.).

¹¹ See above, § 31.

¹² *Holliday v. National Telephone Co.* [1899] 2 Q.B. 392, 398; *Hardaker v. Idle District Council* [1896] 1 Q.B. 385, 351.

¹³ *Chapman* in 50 L.Q.R. 71, 78. Yet see *Darling v. Att.-Gen.* [1950] 2 All E.R. 798 (entry on land under Defence Regulations).

¹⁴ Above, § 120.

under the rule in *Rylands v. Fletcher* for the acts of an independent contractor. The principle is the same in the case of escape of fire,¹⁵ or of damage done by a savage animal.¹⁶ Again, in the case of extra-hazardous acts, that is, acts which, in their very nature, involve in the eyes of the law special danger to others, an obligation is imposed upon the ultimate employers to take special precautions which they cannot delegate by having the work carried out by independent contractors. Thus in *Honeywill & Stein, Ltd. v. Larkin Bros.*¹⁷ it was held that the plaintiffs who employed the defendants to take flash-light photographs in a cinema were liable to the owners of the cinema for a fire caused by the defendants in carrying out the work.¹⁸

(e) *Nuisance*. We have already seen that an occupier is responsible for the acts of his independent contractor which cause a nuisance to the highway or interfere with his neighbour's right of support. A similar conclusion was arrived at in *Matania v. National Provincial Bank*,¹⁹ in which the nuisance complained of was dust and noise caused by building operations on an extensive scale. It has been suggested that this decision covers the case of any nuisance caused by an independent contractor and incidental to the work which he is instructed to do.²⁰ But it is submitted that this is not so: *Matania's* case was specifically stated to be "not a case of a mere ordinary building operation."²¹

(f) *Illegal acts*. It is sometimes said that an employer is responsible for a contractor whom he has employed to do illegal acts, but this seems to be only an example of the ordinary law governing joint tortfeasors.

¹⁵ *Spicer v. Smee* [1946] 1 All E.R. 489; *Balfour v. Barty-King* [1957] 1 Q.B. 496.

¹⁶ See above, § 182.

¹⁷ [1934] 1 K.B. 191. Pollock (45 L.Q.R. 1) regarded the above as "the best reason of all" for the decision in that case.

¹⁸ To arrange for a journey by aeroplane was not even in 1937 to set in motion a thing dangerous in itself: *Fosbrooke-Hobbes v. Airwork, Ltd.* [1937] 1 All E.R. 108; nor is the employment of a competent plumber to repair a water system: *Torette House Pty., Ltd. v. Berkman* (1939) 62 C.L.R. 637.

¹⁹ [1936] 2 All E.R. 693.

²⁰ Friedmann, 59 L.Q.R. 70. *Spicer v. Smee* [1946] 1 All E.R. 489, which might seem to support this, was a case of escape of fire.

²¹ [1936] 2 All E.R. at 651, per Finlay J.

Collateral negligence

An employer is never liable for the collateral or casual negligence of his independent contractor. It is not always easy to decide whether the negligent act in a particular case is collateral or not. Thus in *Padbury v. Holliday & Greenwood, Ltd.*,²² where one of the sub-contractors' workmen placed a tool on a window-sill, not in the ordinary course of the work which the contractors were employed to do, and the casement having been blown to by the wind the tool fell and injured the plaintiff, it was held that this was collateral negligence and the ultimate employers were not liable. On the other hand, in *Holliday v. National Telephone Co.*,²³ where, owing to the negligence of a plumber employed as an independent contractor to do work in a public street, molten solder was scattered by the explosion of a benzoline lamp, judgment was given for the defendant in the court below on the express ground that the negligence of the plumber was merely collateral. Nevertheless the Court of Appeal disagreed with this view and gave judgment for the plaintiff. Probably the rule as to collateral negligence means nothing more than that the negligence required to impose liability upon the employer of an independent contractor must be negligence committed in the doing of the act itself which he is employed to do, and that negligence in other operations which, though connected with that work, are not themselves part of the work which he has contracted to do is not sufficient.²⁴ The employer is exempt from liability, not so much because the act done cannot be foreseen or guarded against, but because it is outside the scope of the duty imposed on the employer. Thus, if the defendant employs a contractor to make an excavation in a street, the defendant will be responsible for the negligence of the contractor in failing to light or guard the excavation, but will not be responsible for his negligence in carting materials to or from the scene of the operations. The latter work is equally within the scope of the contractor's employment, and if the person so employed was a

²² (1912) 28 T.L.R. 494.

²³ [1899] 2 Q.B. 392.

²⁴ This sentence was cited in *M'Donald v. Associated Fuels* [1954] 3 D.L.R. 775 at 779. See also *Torette House Pty., Ltd. v. Berkman* (1939) 62 C.L.R. 637, 648; *Thompson v. Anglo-Saxon Petroleum Co., Ltd.* [1955] 2 Lloyd's Rep. 363.

servant, his employer would be responsible,²⁵ whereas it is otherwise with an independent contractor. For such work is outside the principle of the rule, which is that certain things are dangerous and therefore can only be done at the employer's risk. If the accident is caused by something which has no connection with the special risk the employer is not liable.

²⁵ *Dalton v. Angus* (1881) 6 App.Cas. 740, 829; *Cassidy v. Ministry of Health* [1951] 2 K.B. 343, 364.

JUDICIAL REMEDIES

§ 203. Preliminary

REMEDIES for torts are of two kinds, being either judicial or extra-judicial—remedies by way of an action at law, and remedies by way of self-help. The various forms of extra-judicial remedy, such as distress, the retaking of property, and the abatement of a nuisance, will be considered in the next chapter, and we are here concerned with the other class alone.

The remedies obtainable for a tort by means of an action are of three chief kinds—damages, injunction, and specific restitution of property. The first of these is the ordinary and characteristic remedy. An injunction is the order of a court directing the defendant to abstain from the commission, continuance, or repetition of an unlawful act or to do some act which he is legally bound to do—such an order being enforced by imprisonment (by way of attachment or committal for contempt) in case of disobedience. Injunction is a remedy against present or impending injury; damages are a remedy for an injury already suffered. The third form of judicial remedy is the specific restitution of property. He who is wrongfully dispossessed of his land, for example, is entitled to recover, not the value of the land as damages, but the land itself; and a judgment in his favour will be executed by force if need be. So in the case of chattels wrongfully taken or detained the owner has the option of claiming either their value as damages or specific restitution of possession.

§ 204. Damages

Damages are classified in several ways.

(1) *Nominal or real*

Nominal damages are a small sum of money—for example, a shilling—awarded not by way of compensation for any actual loss suffered, but merely by way of recognition of the existence of some legal right vested in the plaintiff and violated by the

defendant. Real damages, on the other hand, are those which are assessed and awarded as compensation for damage actually suffered by the plaintiff, and not simply by way of mere recognition of a legal right violated—*injuria sine damno*. Damages are not nominal merely because they are very small. If actual damage, however small, is proved, and damages, however small, are awarded in respect of it, such damages are real and not nominal. They represent *damnum*, and not merely *injuria*. Nominal damages must also be distinguished from contemptuous damages¹: the former term is appropriate in a case where the plaintiff is not concerned with his actual loss (if any), but brings his action with the sole and proper object of establishing his right; the latter term indicates that in the opinion of the jury the action should not have been brought at all.²

When recoverable

It follows accordingly that nominal damages are recoverable only in the case of torts which are actionable *per se*. If such a right is violated the law presumes damage and an action will lie even though no damage at all has in fact been suffered by the plaintiff. This is the case in all types of trespass, whether to land, goods or the person, and in some actions on the case, as in libel and in certain cases of slander. Thus in *Ashby v. White*,³ Sir John Holt C.J. held that an elector had a right of action against a returning officer who wrongfully and maliciously rejected his vote at an election, even though the candidate for whom he intended to vote was elected. "So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon,⁴ yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it did him no damage: for it is an invasion of his property and the other has no right to come there."⁵ So again in *Constantine v. Imperial London Hotels*⁶ the plaintiff, the

¹ Halsbury, vol. ii, pp. 220–221.

² But where loss of liberty is concerned there is no room for contemptuous damages: *Pike v. Waldrum* [1952] 1 Lloyd's Rep. 431, 455. Cf. *Hook v. Cunard Steamship Co., Ltd.* [1953] 1 All E.R. 1021.

³ (1703) 2 Ld.Raym. 938. The principle of this case is unaffected by the protection given to returning officers by the Representation of the People Act, 1949, s. 50.

⁴ Plaster.
⁵ 2 Ld.Raym. 938, at 955. (Yet note that in *Ashby v. White* itself the damages which the plaintiff recovered were real and not merely nominal.)

⁶ [1944] K.B. 693.

famous West Indian cricketer, was held entitled to nominal damages of five guineas because the defendants wrongfully refused to receive him into one of their hotels to which he wished to go, though they provided him with lodging in another of their hotels.

(2) Real damages

But in many cases the plaintiff's only right is not to be caused damage by the defendant, and in such a case he must prove actual damage. Damage then is the gist of the action. Thus, for example, damage must be proved in an action of negligence, and indeed in the great majority of actions on the case. Where the damages are real it becomes necessary to determine what is the measure of damages in each case.

Properly speaking, the term "measure of damages" means the mode by which compensation for actionable loss is calculated and does not include the kinds of injury or loss which are to be taken into account.⁷ The question of remoteness (what items?) is always anterior to the question of the measure of damages (how much?).⁸ It is sometimes said⁹ that the general principle of assessment is *restitutio in integrum*. But this cannot always be applied to actions in tort. To quote Lord Dunedin, "If by somebody's fault I lose my leg and am paid damages, can anyone in his senses say that I have had *restitutio in integrum*?"¹⁰ There are some kinds of damage for which no true compensation can be given in this world by any amount of money, no matter how elaborate an arithmetical computation is employed. This is particularly so with claims for loss of expectation of life and pain and suffering. Yet the courts are obliged to do the best they can. In such cases the plaintiff is entitled to fair and reasonable compensation, assessed in the light of previous rewards in respect of comparable damage. "It would be paradoxical if the law refused to give any compensation at all because none could be adequate."¹¹ It might be better to say that such sums are "an acknowledgment of regret for having caused a hurt that

⁷ Cheshire and Fifoot, *Contracts*, pp. 514-515.

⁸ Clerk and Lindsell, *Torts*, p. 295.

⁹ *The Kate* [1899] P. 168.

¹⁰ *Admiralty Commissioners v. S.S. Valeria* [1922] 2 A.C. 242, at 248. See also *The Edison* [1932] P. 52, 67 and [1933] A.C. 449, 459.

¹¹ *Rose v. Ford* [1937] A.C. 826, at 848, per Lord Wright.

is imponderable rather than a compensation properly so called.”¹²

(3) General or special

General damages are compensation for general damage; special damages for special damage. General damage is that kind of damage which the law presumes to follow from the wrong complained of and which, therefore, need not be expressly set out in the plaintiff's pleadings. Special damage, on the other hand, is damage of such a kind that it will not be presumed by the law and must therefore be expressly alleged in those pleadings so that the defendant may have due notice of the nature of the claim—otherwise the plaintiff will not be permitted to give evidence of it nor will the jury be at liberty to award compensation in respect of it. Thus in the case of a collision between two ships or motor-cars due to the negligence of the defendant, the plaintiff will be able to recover general damages for the loss of the use of his ship during the repairs,¹³ even if it be not used for trading for profit,¹⁴ or for the loss of the use of his motor-car even though it be used only for pleasure purposes. Nor will it avail the defendant to prove that even apart from the collision the plaintiff would not have in fact made use of the damaged vehicle. “What right,” asked Lord Halsbury L.C., in *The Mediana*,¹⁵ “has a wrongdoer to consider what use you are going to make of your vessel? . . . Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by showing that I did not usually sit in that chair, or that there were plenty of other chairs in the room?”

(4) Compensatory, aggravated or exemplary

Compensatory damages are awarded as compensation for, and are measured by, the material loss suffered by the plaintiff. Aggravated damages may be awarded when the motives and conduct of the defendant aggravate the injury to the plaintiff.

¹² *M'Leish v. Fulton & Sons*, 1955 S.C. 46, at 49, per Lord Carmont.

¹³ *Carslogie Steamship Co. v. Royal Norwegian Government* [1952] A.C. 292.

¹⁴ For the mode of assessing damages in such a case, see *The Hebridean Coast* [1961] A.C. 545.

¹⁵ [1900] A.C. 113 at 117. See also *Caxton Publishing Co. v. Sutherland Publishing Co.* [1939] A.C. 178, 192, 203; *Shearman v. Folland* [1950] 2 K.B. 43.

Insult and injured feelings are a proper subject for compensation. In such a case damages are at large precisely because the "real" damage cannot be ascertained: it is not a matter of determining the "real" damage and adding to that a sum by way of punitive damages.¹⁶ Exemplary damages, on the other hand, are a sum of money awarded in excess of any material loss or by way of *solatium* for an insult or other outrage to the plaintiff's feelings that is involved in the injury complained of.¹⁷ The House of Lords has restated the law relating to exemplary damages and severely limited their field of operation.¹⁸ In principle exemplary damages are objectionable. They infringe the principle that the object of the law of torts is compensation and not punishment, and they also impose on the defendant something equivalent to a fine in criminal law but without the safeguards provided by the criminal courts. Still there remain three classes of case in which the award of exemplary damages is justifiable.¹⁹ The first class is oppressive, arbitrary or unconstitutional action by the servants of the government.²⁰ The second class is when the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.²¹ The third class exists when statute has specifically permitted such an award.²²

"Parasitic" damages

It sometimes happens that damage which is in itself *damnum sine injuria* is caused by an act which, by reason of some other kind of damage also caused by it to the same person, is wrongful and actionable at the suit of that person. For example, a building which wrongfully obstructs the ancient lights of an adjoining building may at the same time obstruct other windows in that building which have not yet acquired legal protection. In such cases the damages recoverable for the wrongful act

¹⁶ *McCarey v. Associated Newspapers, Ltd.* [1964] 3 All E.R. 947.

¹⁷ This sentence was cited with approval by Ross J. in *Vesey v. Public Trustee* [1960] S.A.S.R. 71, at 72-73.

¹⁸ *Rookes v. Barnard* [1964] A.C. 1129.

¹⁹ *Rookes v. Barnard* [1964] A.C. 1129.

²⁰ As in the General Warrant Cases, discussed in Heuston, *Essays in Constitutional Law*, pp. 35-36.

²¹ For an example, see *McCarey v. Associated Newspapers Ltd.* [1964] 3 All E.R. 947, 959.

²² As under the Reserve and Auxiliary Forces (Protection of Civil Interests) Act, 1951, s. 18 (2).

include compensation for the whole loss so caused, even though part of that loss is in itself *damnum sine injuria*.²³ In other words, *damnum sine injuria*, although not itself a cause of action, may be a sufficient ground for damages in a claim based on some other independent cause of action.²⁴ This has been aptly called the "parasitic" element in damage.²⁵

§ 205. Remoteness of Damage: Introduction ²⁶

In a former chapter, under the head of *damnum sine injuria*, it has been pointed out in general terms that a person is not necessarily responsible in law for all the harm that he inflicts either wilfully, negligently or accidentally on other persons.²⁷ A plaintiff who has suffered damage in consequence of the act of the defendant may be disentitled to recover compensation:

- (1) Because the defendant's act was not wrongful at all;
- (2) Because the plaintiff is not the person to whom the defendant owed the duty which he has violated;
- (3) Because the damage is not of a kind recognised by the law;
- (4) Because the damage has been caused in a manner which the law does not recognise as a sufficient ground of liability.

These four cases will be considered in their order.

²³ *Griffith v. Clay (Richard) & Sons, Ltd.* [1912] 2 Ch. 291.

²⁴ See also *Jackson v. Watson & Sons* [1909] 2 K.B. 193 (damages for the death of a human being); *Campbell v. Paddington Corporation* [1911] 1 K.B. 869 (loss of a view); *The Wagon Mound (No. 2)* [1963] 1 Lloyd's Rep. 402, 431.

²⁵ Street, *Foundations*, i, p. 461. At p. 470 he says: "The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognised as parasitic will, forsooth, tomorrow be recognised as an independent basis of liability."

²⁶ The leading monograph is Hart and Honoré, *Causation in the Law* (Oxford, 1959). See also Keeton, *Legal Cause in the Law of Torts* (Ohio, 1963). The periodical literature is vast, but the following are particularly valuable: Goodhart, *Essays*, Chaps. 6 and 7; Tilley, "The English Rule as to Liability for Unintended Consequences" (1935) 33 Mich.L.Rev. 829; Porter, "The Measure of Damages in Contract and Tort" (1934) 5 Camb.L.J. 178; Lord Wright, "*Re Polemis*" (1951) 14 M.L.R. 393; Lord Wright, "Causation and Responsibility in English Law" [1955] C.L.J. 163; Goodhart, "The Third Man" [1951] C.L.P. 177; *idem*, "The Imaginary Necktie and the rule in *Re Polemis*" (1952) 68 L.Q.R. 514; Goodhart, "Liability and Compensation" (1960) 76 L.Q.R. 567; Williams, "The Risk Principle" (1961) 77 L.Q.R. 179; Dias, "Remoteness of Liability and Legal Policy" [1962] C.L.J. 178 (which has a useful bibliography).

²⁷ See above, §§ 4-5.

(1) *Damnum sine injuria*

The first class of case calls for no special consideration. This is the case of *damnum sine injuria* in the strictest sense of that term. There is *damnum* suffered by the plaintiff, but no *injuria* committed by the defendant, either against the plaintiff or against any other person. The plaintiff's interests are not protected against conduct of this kind. Illustrations from cases which have already been discussed are damage done by way of competition in trade²⁸; or by domestic animals escaping on to the highway²⁹; or by the withdrawal of underground water.³⁰

(2) *Damnum suffered by one person and injuria by another*

In the second class of case there is both *damnum* and *injuria*, but the *damnum* is suffered by one person and the *injuria* by another. A person who suffers *damnum* cannot recover compensation on the basis of *injuria* suffered by another. He who does a wrongful act is liable only to the person whose rights are thereby violated. He is not bound to make compensation to all persons who, in the result, suffer harm from his wrongdoing. The *damnum* and *injuria* must be united in the same person. So in *Cattle v. Stockton Waterworks Company*³¹ the plaintiff was a contractor who had undertaken to construct a tunnel under land belonging to another person. The defendants, the owners of adjoining waterworks, negligently allowed the escape of water from their main, and this escape rendered the completion of the plaintiff's contract much more difficult and costly than it would otherwise have been. Nevertheless the plaintiff was held to have no cause of action for the loss so suffered by him.

(3) *Damnum of a kind not recognised by law*

The third class of case is that in which, although the defendant's act is wrongful, and although the duty violated by him was a duty towards the plaintiff, nevertheless the damage resulting to the plaintiff is not recoverable, because it is not the kind of damage which it is the purpose of the law to prevent or to give redress for. Thus at common law, before the Fatal Accidents Acts, 1846 to 1959, no damages could be recovered for

²⁸ *Mogul Steamship Co. v. McGregor, Gow & Co.* [1892] A.C. 25.

²⁹ *Searle v. Wallbank* [1947] A.C. 341.

³⁰ *Bradford (Mayor of) v. Pickles* [1895] A.C. 587.

³¹ (1875) L.R. 10 Q.B. 453.

the death of a human being. The protection of human life was left to the criminal law. Again, when the plaintiff's cause of action is based on the provisions of some statute, it is not enough that the plaintiff should be one of the persons for whose benefit and protection the statute was made, and that he should have actually suffered damage. It is also necessary that the damage so suffered by him shall be the kind of damage which the statute was meant to prevent or to give compensation for.³²

(4) Damnum too remote

It remains to consider the fourth and last class of case in which damage is irrecoverable. In this class of case the plaintiff fails because the chain of causation connecting the defendant's act with the damage resulting from it is of such a nature that the law for some reason refuses to regard it as sufficiently continuous for liability. Damage of this kind is said to be too remote—the causal connection between it and the defendant's act being regarded by the law as not sufficiently direct to create responsibility. This doctrine of remoteness of damage is one of very considerable obscurity and difficulty. This much, however, may be taken as certain, that no man is responsible *ad infinitum*, even to the person injured by him, for all the ulterior consequences of his wrongful act, however remote in time and however indirect the process of causation. "The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because 'it were infinite for the law to judge the cause of causes,' or consequences of consequences. . . . In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons."³³

This statement is typical of many to be found in the reports. There are many judicial statements praising the value of

³² See above, § 99.

³³ *Liesbosch Dredger v. Edison* [1933] A.C. 449, at 460, *per Lord Wright*. See also the same learned Law Lord in *Monarch Steamship Co. v. A/B Karlshamns Oljefabriker* [1949] A.C. 196, 226: "Those interested in philosophy will find modern philosophic views on causation explained in Russell's *History of Western Philosophy* in the chapter on Hume, Book 3, Chap. xvii. The common law, however, is not concerned with philosophic speculation, but is only concerned with ordinary everyday life and thoughts and expression."

“common-sense principles” and warning against too ready a reliance on “philosophy,”³⁴ or the “grave danger of being led astray by scholastic theories of causation and their ugly and barely intelligible jargon.”³⁵ Some writers go so far as to say that it is impossible to characterise any principles on which common sense proceeds. But “This seems a counsel of despair which we should hesitate to accept. . . . Common sense is not a matter of inexplicable or arbitrary assertions, and the causal notions which it employs, though flexible and complex and subtly influenced by context, can be shown to rest, at least in part, on stateable principles; though the ordinary man who uses them may not, without assistance, be able to make them explicit.”³⁶ Nor should it be assumed (as it seems sometimes to have been done) that philosophy is equivalent to that department of it called metaphysics: much can be learnt from the empiricists of the past and their influential descendants of the present day.³⁷

A common-sense approach

An attempt has been made recently to state more explicitly those common-sense principles of causation according to which the courts have consistently said that causal questions must be decided.³⁸ These principles cannot provide conclusive answers to the complex causal questions which the courts are sometimes obliged to answer, but serve rather as an organising framework within which a choice may be made according to whatever considerations of policy the law may consider to be relevant. At the outset it should be noted that a question as to the cause of an event may lead to answers which vary according to the context

³⁴ As in the following quotation: “The common law of this country has been built up, not by the writings of logicians or learned jurists, but by the summings-up of judges of experience to juries consisting of plain men, not usually students of logic, not accustomed to subtle reasoning, but endowed, so far as my experience goes, as a general rule, with great common sense, and if an argument has to be put in terms which only a school-man could understand, then I am always very doubtful whether it can possibly be expressing the common law”: *Smith v. Harris* [1939] 3 All E.R. 960, at 967, *per* du Parcq L.J.

³⁵ *Overseas Tankship (U.K.), Ltd. v. Morts Dock & Engineering Co., Ltd. (The Wagon Mound)* [1961] A.C. 388, at 419.

³⁶ Hart and Honoré, *Causation in the Law*, p. 24.

³⁷ Even a Law Lord has said that he used the term philosopher “in no disparaging sense, for what is a philosopher but one who, *inter alia*, reasons severely and with precision?”: *Stapley v. Gypsum Mines, Ltd.* [1953] A.C. 663, at 687, *per* Lord Asquith of Bishopstone.

³⁸ Hart and Honoré, *Causation in the Law*, Chap. 2.

of the inquiry. "A car skids while cornering at a certain point, turns turtle, and bursts into flames. From the car-driver's point of view, the cause of the accident was cornering too fast, and the lesson is that one must drive more carefully. From the county surveyor's point of view, the cause was a defective road surface, and the lesson is that one must make skid-proof roads. From the motor-manufacturers' point of view, the cause was defective design, and the lesson is that one must place the centre of gravity lower."³⁹

This passage also helps us to understand the basic principle in the common-sense notion of cause that "*the cause*" is one condition selected from a complex set of conditions which, according to known generalisations, are together jointly sufficient for the occurrence of the consequence in question. For, even though the road surface is defective, a car will not skid unless certain other conditions are satisfied—*e.g.*, the car must be of a certain weight and construction and be moving at a certain minimum speed.⁴⁰ Within this jointly sufficient set of conditions common sense (like the law) distinguishes mere conditions from causes, and the principal criterion for this distinction lies in the contrast between (1) a voluntary human action and other conditions, (2) an abnormal contingency (*e.g.*, an act of God or a coincidence) and other conditions. The legal distinctions of *novus actus interveniens*, superseding cause, and proximate cause may be defined in terms of these contrasts. It should be noted that although either an abnormal contingency or a voluntary human act may negative causal connection, there are differences between them. Thus an abnormal contingency only negatives causal connection if it intervenes in time between the wrongful act and the consequence; whereas a voluntary act may negative causal connection even though it precedes in time both the wrongful act and the harm.

³⁹ Collingwood, "The Idea of Cause" (1938) Aristotelian Society Proceedings 85 (cited in 69 L.Q.R. 433). Note some words of Lord Porter, written before he became a judge (5 Camb.L.J. 189): "The fact is that judges like the rest of us are human and, where for a particular decision accuracy is not essential, will use several words in the same sense or one in several. It is not by pressing the meaning attributed to a word in one or two instances that its true meaning can be obtained."

⁴⁰ It should be remembered that the jointly sufficient set of conditions may include negative conditions—*e.g.*, the failure to give the appropriate signal—as well as positive ones. The contrary view rests on the erroneous belief that "a cause" is analogous to a physical movement. See below, n. 53.

Finally, it is worth noting that the broad open question "What is the cause of this event?" is more suited to those inquiries in which we are seeking to discover the explanation of how or why some contingency happened. But when an explanation has been provided (or when none is needed) the more circumscribed question "Given this wrongful act (or other designated event) and given this loss or harm, is the latter the consequence of the former?" is appropriate. To ask the question in this way makes it plain that we are not seeking to understand what has happened but to allocate responsibility. This form of question is also helpful when we are considering a case which raises the issue of *novus actus interveniens*, for it makes it plain that the real problem is whether some third factor (which may be the act or omission of a human being, or the act of an animal, or a natural event or state of affairs) prevents the attribution of a given harm to a given action or contingency as its consequence.

Some preliminary conclusions

Before investigating this difficult topic more fully, it may be convenient to summarise briefly some conclusions which both on principle and authority seem to be indisputable.

First, an event may be the consequence of several causes. Until the Law Reform (Contributory Negligence) Act, 1945, altered the law, there was a tendency to believe that there could not have been more than one effective cause of any single event. This error has now been exposed. "Nowadays in tort we do not search, as previously, for the effective or predominant cause of the damage. We recognise that there may be many causes of one damage, and we ask: What were the causes of it? What faults were there which caused the damage?"⁴¹ But it is still necessary to avoid the fallacy of assuming that because one cause might have brought about a certain event therefore more than one cause could not have done so.⁴²

Secondly, the doctrine of remoteness of damage applies not merely to wrongs of negligence, but to wrongs of all kinds, whether wilful, negligent, or of absolute liability. Even a wilful

⁴¹ *Cork v. Kirby MacLean, Ltd.* [1952] 2 All E.R. 402, at 406, *per* Denning L.J.

⁴² *Stapley v. Gypsum Mines, Ltd.* [1953] A.C. 668, 665.

wrongdoer is not liable *ad infinitum* for all the consequences which in fact flow from his wrongful act. Nevertheless it appears that different rules govern the question of remoteness in torts of strict liability as distinct from the tort of negligence.⁴³

Thirdly, on the other hand, a consequence cannot be held too remote if it was actually intended by the wrongdoer. The defendant is held responsible for all those consequences which he actually desired and intended to inflict upon the plaintiff, however remote may be the chain of causation by which he effected his purpose.⁴⁴ In other words, an extraordinary conjunction of events, if intended or designed, does not amount to such a coincidence as to negative causal connection.

Fourthly, the rule as to remoteness of damage has again no application to those cases in which the defendant has wrongfully taken possession of or otherwise dealt with property in such a manner that it is now at his risk. In such a case he is responsible for any resulting loss, destruction of, or damage to that property, however remote that consequence may be. The property is at his risk, and he must either return it or pay for it. Thus in *Hiort v. Bott*⁴⁵ the defendant wrongly delivered the plaintiff's goods to a third person to be taken back to the plaintiff, and was held responsible for their misappropriation by the person to whom he delivered them.

Fifthly, the question as to remoteness of damage must always be carefully distinguished from the preliminary question whether the defendant has been guilty of any wrongful act at all. It is only if this latter question is answered in the affirmative that the first question arises at all. Until recent years the two questions were answered by the application of different tests. In considering the authorities it is not always easy to trace this distinction and to keep it clearly in mind. To treat as a question of remoteness what is really a question as to the existence of negligence or other fault, is a fertile source of confusion.⁴⁶

⁴³ *The Wagon Mound* (No. 2) [1963] 1 Lloyd's Rep. 402.

⁴⁴ *Quinn v. Leathem* [1901] A.C. 495, 537. It is disputed whether an intentional wrongdoer is liable for unforeseeable consequences: *Honoré*, 39 Can.Bar Rev. 273-274.

⁴⁵ (1874) L.R. 9 Ex. 86. See above, § 39.

⁴⁶ This is the point which is so well illustrated by *Palsgraf v. Long Island Railroad Co.* (1928) 248 N.Y. 339: see above, § 85.

Sixthly, it is for the judge to direct the jury whether there is any evidence that a particular consequence is in law capable of being "natural and direct" or "reasonably foreseeable," and it is then for the jury to find as a fact whether a particular head of damage is such a consequence.⁴⁷ In this sense the question of remoteness may be said to be one of fact.

§ 206. Tests of Causation

A number of different tests of causation have been proposed. We shall now consider in detail the more important judicial and extra-judicial suggestions.

(1) Different kinds of cause

Various qualifying adjectives have been attached to the word "cause" to determine whether the consequence is too remote. Thus it has been said by some that damage is too remote unless the act of the defendant is the real, by some the effective, by some the substantial cause of it,⁴⁸ whilst yet others using the language of the older logicians have distinguished the *causa causans* from the *causa sine qua non*.⁴⁹ The question has been much, and fruitlessly, discussed in cases on the assessment of damages for personal injuries. Is the tort the *causa causans* of the payment of a pension⁵⁰ or an insurance benefit,⁵¹ or the remarriage of a widow to a kind step-father.⁵²

It would seem clear, however, that none of these qualifying adjectives expresses any true or intelligible distinction. A cause which is not the real cause is not a cause at all. All causes are effective and substantial causes, otherwise they could not produce the consequences. Again, the act of the defendant may be a sufficient ground of liability even if it is merely the passive and antecedent *causa sine qua non*.

⁴⁷ *Mehmet Dogan Bey v. Abdeni, Ltd.* [1951] 2 K.B. 405.

⁴⁸ *Englehart v. Farrant & Co.* [1897] 1 Q.B. 240; *De la Bere v. Pearson* [1907] 1 K.B. 483.

⁴⁹ *Weld-Blundell v. Stephens* [1920] A.C. 956, 984; *Cutler v. United Dairies* [1933] 2 K.B. 297, 305; *Holling v. Yorks Traction Co.* [1948] 2 All E.R. 662, 664. "Dominant," "immediate" and "precipitating" are other adjectives which have been judicially used: *Minister of Pensions v. Chen-nell* [1947] K.B. 250; *Howgate v. Bagnall* [1951] 1 K.B. 265.

⁵⁰ No, according to Cohen L.J. in *Payne v. Railway Executive* [1952] 1 K.B. 20, 36.

⁵¹ No, according to *Bradburn v. G.W. Ry.* (1874) L.R. 10 Ex. 1.

⁵² Yes, according to *Mead v. Clark, Chapman & Co., Ltd.* [1956] 1 W.L.R. 76.

(2) The chain of causation

Others again have said that the test of remoteness is whether the chain of causation has been interrupted or broken by some independent intervening cause: that a defendant remains liable for all consequences until such an interruption or breach frees him from further liability. Such is, however, the language of metaphor,⁵³ and the metaphor is not completely satisfactory. It cannot mean that the chain of causation is broken or interrupted in fact; for in that case the damage would not be a consequence of the defendant's act at all, and therefore no question of directness or remoteness could arise. The meaning can only be that, though the chain of causation remains unbroken in fact, it is deemed in law to have been interrupted so as to save the defendant from further liability for ensuing damages. But the very question for determination is what facts are sufficient to induce the law to take this view of the matter.

(3) The test of proximate cause

Another test sometimes proposed is that of proximate cause. But this might suggest that only the cause which is latest in time is significant, whereas the proximate cause is not necessarily the one which operates last.⁵⁴ "The old flint-lock musket required a flash in the pan to ignite the powder and drive out the bullet, but death due to penetration by the bullet would not naturally be described as death by fire."⁵⁵ It is now clear that

⁵³ Other metaphors which have been judicially used refer to conduit pipes, transmission gears, nets, rivers and streams. "It was his hand that let the tiger out of the cage," said Oliver J. of an employee who switched on a dangerous machine to clean it: *Williams v. Sykes & Harrison, Ltd.* [1955] 1 W.L.R. 1180, 1189. The main objection to metaphors about causation is that they foster a confused conception of a cause as something which, like a human being or a moving thing, may exert more or less power at different times. Despite the many criticisms of metaphors they continue to be used. "The instrument most effective to move the mind seems to be the lucky metaphor. Perhaps the main business of the lawyer in this matter of causation is simply the finding of that metaphor which is capable of moving the mind to see in the event (which is probably neutral in itself) the pattern which he desires to be seen there": Hamson, [1954] C.L.J. 41.

⁵⁴ *Yorkshire Dale S.S. Co. v. Minister of War Transport* [1942] A.C. 691, 698.

⁵⁵ *Boiler Inspection and Insurance Company of Canada v. Sherwin-Williams Company of Canada* [1951] A.C. 319, at 337, per Lord Porter. Yet Professor Prosser says: "I doubt that all the manifold theories of the professors really have improved at all upon the old words 'proximate' and 'remote,' with the idea they convey of some reasonable connection between the original negligence and its consequences": *Topics*, p. 242.

it is a fallacy to suppose that the last cause is the sole cause.⁵⁶

(4) The doctrine of equivalence of conditions

A number of writers have accepted the view that all the necessary conditions of an event are equally entitled to be called the causes of that event: every event is the result of a "cone of causation" stretching back to the beginning of the world. It follows that these writers are obliged not only to deny the existence of the distinction between causes and mere conditions (a distinction which is, as we have seen, embedded in the structure of common sense thinking about causation) but also to assert that when a court selects one out of the multiplicity of necessary conditions as "the cause" of an event its decision is based upon some irrational and inexplicable ground of policy. But there is no evidence that this doctrine has been accepted by the courts.⁵⁷

(5) The test of natural and probable consequences or reasonable foreseeability

There was always some authority⁵⁸ for the proposition that a wrongdoer is liable only for damage which was intended by him or which, though not intended, was the natural and probable consequence of his wrongful act. On this principle no man is responsible for consequences neither intended nor probable. A

⁵⁶ *Miller v. South of Scotland Electricity Board*, 1958 S.C.(H.L.) 20, 39.

⁵⁷ It was explicitly rejected by Vaisey J.: "The argument in the old fable in which the loss of a kingdom is traced back to an originating and ultimate cause in the loss of a single nail from a horse's shoe does not commend itself to me as adaptable to this case": *Norris v. William Moss & Sons, Ltd.* [1954] 1 W.L.R. 346, at 351.

⁵⁸ It rested mainly upon dicta of Pollock C.B. in two cases decided upon the same day, May 8, 1850—*Rigby v. Hewitt*, 5 Ex. 240, 248, and *Greenland v. Chaplin*, 5 Ex. 243, 248. These dicta were of an extremely non-committal character, and were not agreed to by the other members of the court, but were accepted by Pollock's grandson in successive editions of his *Torts* and by Salmond as a correct statement of the law. A similar view was expressed in dicta in *Lynch v. Knight* (1861) 9 H.L.C. 577, 600; *Sharp v. Powell* (1872) L.R. 7 C.P. 253, 258; *Clark v. Chambers* (1877) 3 Q.B.D. 327, 338; *Cory & Sons v. France, Fenwick & Co., Ltd.* [1911] 1 K.B. 114, 122, which were all emphatically approved by the Judicial Committee in *The Wagon Mound* [1961] A.C. 388, 418-19. Landon suggested that some of the misconceptions that arose were due to a misunderstanding of the word "probable." In the expression "natural and probable" it was originally used in its technical sense of *probabilis* or *provable*; it has been taken in its popular sense of "likely to happen." Cf. above § 171, note 53.

consequence is for this purpose natural and probable when it is so likely to result from the act that a reasonable man in the circumstances of the wrongdoer, and with his knowledge and means of knowledge, would have foreseen it and abstained from the act accordingly. In other words, the test of remoteness of damage is treated as identical with the test of negligence. This test of reasonable foreseeability, having been decisively rejected by the Court of Appeal in *Re Polemis*,⁵⁹ was as decisively accepted and restored to favour by the Judicial Committee in *Overseas Tankship (U.K.), Ltd. v. Morts Dock and Engineering Co., Ltd.*,⁶⁰ an appeal from the Full Court of the Supreme Court of New South Wales. (This case is generally known as *The Wagon Mound*, the name under which it is reported in the courts below.⁶¹) We shall consider first the decision in *Re Polemis* and then the decision in *The Wagon Mound*.

(6) The test of direct consequences

The Court of Appeal in *Re an Arbitration between Polemis and Furness, Withy & Co.*⁶² rejected the supposed rule that a wrongdoer is only responsible for the natural and probable consequences of his act. The court held that the probability of evil consequences is a test of whether the defendant was negligent or not; but if he was negligent, he is liable for the direct physical consequences whether probable or not. In that case Messrs. Polemis and Boyazides, the owners of the Greek steamship *Thrasyvoulos*, chartered the ship to Furness, Withy and Company, who loaded in the hold a quantity of petrol⁶³ in tins. During the voyage the tins leaked, and in consequence there was a considerable quantity of petrol vapour in the hold. At Casablanca in Morocco it became necessary for the Arab stevedores, servants of the charterers, to shift some of the cases, and for this purpose they placed a number of heavy planks at the end of the hatchway for use as a platform. While a sling containing the cases was being hoisted, the rope was negligently allowed to come into contact with these planks and to displace one of them, which fell

⁵⁹ [1921] 3 K.B. 560.

⁶⁰ [1961] A.C. 388.

⁶¹ [1958] 1 Lloyd's Rep. 575 (Kinsella J.); [1959] 2 Lloyd's Rep. 697 (Full Court).

⁶² [1921] 3 K.B. 560.

⁶³ Described in some reports as benzine—a foreign term for petrol.

into the hold. The fall of the plank was immediately followed by an outbreak of fire in the hold caused by the ignition of the petrol vapour by a spark struck by the falling plank. The ship was totally destroyed by fire.

The shipowners then claimed the value of the ship from the charterers, who relied, by way of defence, on the excepted perils clause in the charterparty, which was in the customary form, "act of God, the King's enemies, loss or damage from fire on board . . . excepted." The reply to this was that an excepted perils clause has no effect if the peril in question has been brought about by the negligence of the charterers or their servants. This was the issue referred to arbitration, and at first sight it might seem that the claim had little or nothing to do with the tort of negligence. The claim was upon a contract (a charterparty), and the issue was the simple one whether the negligence (in the sense of carelessness) of the defendants disentitled them from relying on the exemption clause.⁶⁴ But the charterers expressly pleaded that the damage was too remote,⁶⁵ and the case was regarded as one of tort before Sankey J. and the Court of Appeal. The experienced arbitrators⁶⁶ from whom the appeal was brought found as a fact that the causing of the spark could not reasonably have been anticipated from the falling of the plank, though some (unspecified) damage to the ship might reasonably have been anticipated.⁶⁷ A strong Court of Appeal unanimously held the charterers liable to the owners for the loss, which amounted to nearly £200,000.⁶⁸ For to allow the plank to fall into the hold was in itself an act of negligence, inasmuch as it would not improbably cause some damage to the ship or cargo. The charterers, therefore, being guilty of negligence, were held liable for the direct consequences of that negligence, though in

⁶⁴ See this point stressed by Manning J. in *The Wagon Mound* [1959] 2 Lloyd's Rep. 697 at 706.

⁶⁵ See McNair, "This Polemis Business" (1931) 4 Camb.L.J. 125, where the pleadings and the judgment of Sankey J. are set out in full. (This seems to have escaped Manning J. in *The Wagon Mound*.) The Judicial Committee ([1961] A.C. 388 at 415) said the point might be relevant for a tribunal for which *Re Polemis* was a binding authority.

⁶⁶ W. Clifton, A. F. Wootten, and Stuart Bevan, K.C.

⁶⁷ Dr. Goodhart says that this finding "was obviously incorrect": *Essays*, p. 146n.

⁶⁸ It is a curious fact that both counsel for the unsuccessful appellants, the future Lords Wright and Porter, later independently accepted the decision as correct: see Porter, 5 Camb.L.J. 176; Wright, 14 M.L.R. 393.

nature and magnitude those consequences were such as no reasonable man would have anticipated. Scrutton L.J.⁶⁹ said: "I cannot think it useful to say the damage must be the natural and probable result. . . . To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage that it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation was not foreseen is immaterial."⁷⁰

The central problem is, of course, to determine the true scope of the term "direct" as used by the court. It can be said to be clear that, as so used, the term direct cause cannot have its strict logical signification, as meaning the immediate or proximate cause, a cause so connected with the consequence that there is no intervening link in the chain of causation.⁷¹ The proposition that the defendant's act must be the direct cause of the damage in this sense would be erroneous. A *nova causa interveniens* does not necessarily make the consequences too remote.⁷²

Some light was thrown upon the meaning of direct cause by the decision of the House of Lords in 1932 in *Liesbosch Dredger (Owners) v. Edison (Owners)*.⁷³ In that case a dredger was sunk owing to the negligence of the *Edison*. The owners of the dredger required it for the performance of a contract, delay in the completion of which exposed them to heavy penalties. Owing to want of funds they could not purchase a dredger to take the place of the *Liesbosch*, and were forced to hire one at an exorbitant rate.

⁶⁹ [1921] 3 K.B. 560, at 576.

⁷⁰ It is worth noting that in the same year Scrutton L.J. remarked that "the question whether damage is a sufficiently direct consequence of negligence to be recoverable, or is too remote, is rather a question of first impression": *The San Onofre* [1922] P. 243 at 253.

⁷¹ The preceding two sentences were cited with approval by Manning J. in *The Wagon Mound* [1959] 2 Lloyd's Rep. 697, 711.

⁷² See below, § 210.

⁷³ [1933] A.C. 449. Lord Wright, whose speech in this case was concurred in by the other Law Lords, later published some further reflections on the case in *Legal Essays*, pp. 96-123.

It was held that the increased loss which the plaintiffs suffered due to their impecuniosity could not be recovered. Their impecuniosity was a separate and concurrent cause, not traceable to the acts of the *Edison*, and was outside the legal purview of the consequences of those acts.⁷⁴ *Re Polemis* was distinguished as being "concerned with the immediate physical consequences of the negligent act, and not with the co-operation of an extraneous matter such as the plaintiff's want of means." It has been suggested that the decision is an authority for the proposition that the principle of *Re Polemis* is limited to direct consequences to the particular interest of the plaintiff which has been invaded,⁷⁵ but in *The Wagon Mound*⁷⁶ the Judicial Committee said it was not easy to see why such a distinction should be drawn or where the line was to be drawn. But in other areas of the law (e.g., the "rescue cases") the courts have often evaluated the various interests which have been invaded.

End of *Polemis*

The principle in *Re Polemis* could claim the support of some of the most eminent common lawyers: from Sir William De Grey C.J. in 1773,⁷⁷ through Channell B. and Blackburn J. in 1871,⁷⁸ down to Lord Sumner in 1920,⁷⁹ there is clear authority to support the view that the defendant is liable for all the direct and immediate consequences of his wrongful act⁸⁰—although, as

⁷⁴ In *Muhammed Issa El Sheikh Ahmed v. Ali* [1947] A.C. 414 (an action in contract) the Judicial Committee without referring to the *Liesbosch* case permitted a plaintiff to recover for the increased loss due to his impecuniosity. See Lord Wright's comment in the *Monarch Steamship Co. Case* [1949] A.C. 196, 224.

⁷⁵ So Lord Wright himself in *Bourhill v. Young* [1943] A.C. 92, 110: 14 M.L.R. 398. Cf. Tilley, 33 Mich.L.R. 829, 847-851.

⁷⁶ [1961] A.C. 388 at 424. The Draft Second Restatement of the Law of Torts also refuses to accept this distinction.

⁷⁷ *Scott v. Shepherd* (1773) 2 W.Bl. 892, 899.

⁷⁸ *Smith v. L. & S. W. Ry.* (1871) L.R. 6 C.P. 14, 21. Yet Pollock (*Torts*, p. 29n.) thought "Blackburn and Willes JJ. would have been shocked beyond measure by *Polemis*' case." It must be admitted that Blackburn J.'s remarks were dicta: the actual decision in *Smith v. L. & S. W. Ry.* rested upon the fact that there was evidence of negligence with respect to the actual consequences that ensued.

⁷⁹ *Weld-Blundell v. Stephens* [1920] A.C. 956, 984. It should be noted that Lord Sumner used the test of direct consequences to limit liability and not to extend it: he thought that what had happened was foreseeable but not direct.

⁸⁰ So Atkin L.J. said in *Hambrook v. Stokes Bros.* [1925] 1 K.B. 141, at 156 that *Re Polemis* "laid down no new law."

we have seen,⁸¹ there is also authority the other way. The decision in *Re Polemis* itself was strongly criticised,⁸² but also strongly defended.⁸³ It was said, and not without reason, that the courts have tried to avoid a direct decision on the issue by denying the existence of a duty wherever the consequences were not such as could reasonably have been foreseen.⁸⁴

But in 1960 the issue was squarely raised before the Judicial Committee of the Privy Council in *The Wagon Mound*⁸⁵ on appeal from New South Wales.

§ 207. The Wagon Mound: the Test of Reasonable Foreseeability⁸⁶

The facts in this case were that the respondents carried on a business in the port of Sydney. They owned and used a wharf on which there was a quantity of tools and equipment. On the date in question a vessel moored at that wharf was being repaired by the respondents' employees, who for this purpose were using electric and oxy-acetylene welding equipment. At the same time the appellants were charterers of the *SS. Wagon Mound*, which was moored some 600 feet away from the respondents' wharf for the purpose of taking in bunkering oil. As a result of the carelessness of the appellants' servants a large quantity of oil was allowed to spill into the bay. Some sixty hours later that oil ignited and a fire spread rapidly and did considerable damage to the wharf and the equipment on it. The outbreak of fire was due to the fact that wind and tide had carried under the wharf some inflammable débris on top of which lay some cotton waste or rag, which had been set alight by molten metal falling from the wharf as a result of the welding operations. Those flames in turn set the floating oil afire. The trial judge made the important finding of fact that the respondents had suffered some

⁸¹ Above, n. 58.

⁸² Particularly by Professor Goodhart: *Essays*, Chaps. 6-7; *ibid.*, "The Imaginary Necktie and the Rule in *Re Polemis*" (1952) 68 L.Q.R. 514.

⁸³ As by Lord Wright, "*Re Polemis*" (1951) 14 M.L.R. 393; Wilson and Slade, "A Re-examination of Remoteness" (1952) 15 M.L.R. 458. Mr. Landon approved it: Pollock, *Torts*, pp. 43-45. See the conspectus of opinions by Paton and Sawyer in 63 L.Q.R. at 478.

⁸⁴ *Chester v. Waverley Municipality* (1939) 62 C.L.R. 1, 29. The decisions in *Bourhill v. Young* [1943] A.C. 92 and *Woods v. Duncan* [1946] A.C. 401 should be considered in the light of this statement.

⁸⁵ [1961] A.C. 388.

⁸⁶ For literature, see above, § 205.

damage from the floating oil in that it had congealed upon and so interfered with the use of the slipways; and that this damage (although no claim for compensation was made in respect of it) "beyond question was a direct result of the escape of the oil," and also reasonably foreseeable by the defendants. He also found that "the *raison d'être* of furnace oil is, of course, that it shall burn, but I find the defendants did not know, and could not reasonably be expected to have known that it was capable of being set afire when spread on water," as its flash-point is about 170°. ⁸⁷

On these findings of fact the Judicial Committee considered whether the case attracted the operation of the rule in *Re Polemis* to render the defendants liable, as the courts of New South Wales had (reluctantly) held them to be. The Judicial Committee reversed the courts below and found that the defendants were not responsible for the fire because the damage in question was not reasonably foreseeable. The Judicial Committee held that the decision in *Re Polemis* should no longer be regarded as good law and that the test of direct consequences was therefore inappropriate.

The reasons given by the Judicial Committee for their decision were: (1) that the Court of Appeal in *Re Polemis* had misinterpreted the earlier authorities and in particular had been misled by a dictum of Lord Sumner in *Weld-Blundell v. Stephens*.⁸⁸ (2) That the authority of the decision in *Re Polemis* had been severely shaken in the years which had followed it by decisions which contradicted or distinguished it. (3) That the decision in *Re Polemis* was objectionable on the ground that "it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be 'direct.' It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be

⁸⁷ At one time this finding was criticised on the ground that it made the foresight of the expert rather than of the reasonable man decisive—what ordinary person would have known the flash-point of furnace oil? But it is now clear that this criticism was unjust: *The Wagon Mound* (No. 2) [1963] 1 Lloyd's Rep. 402. See above, § 87.

⁸⁸ [1920] A.C. 956, 964.

responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.”⁸⁹

§ 208. Assessment of the Wagon Mound Decision

The present state of the law is not too clear. The decision in *The Wagon Mound*, according to the strict doctrine of precedent, is binding only upon a number of inferior tribunals in the Commonwealth and is of only persuasive authority⁹⁰ in the final appellate tribunal in the United Kingdom and in most Commonwealth countries. Yet in the House of Lords it has been assumed,⁹¹ and in the Court of Appeal,⁹² and in the High Court,⁹³ expressly stated, that *Polemis* is no longer law, and that *The Wagon Mound* is the governing authority.

There are a few factors which might, however, be taken into account by any court which feels that it has a free choice in the matter. First, it is not too clear why the Judicial Committee considered the facts of *The Wagon Mound* to raise the same issue as that in *Re Polemis*. If anything is clear beyond argument about that decision, it is that the damage which resulted did flow directly from the negligence of the defendant's employees dealing with highly inflammable vapour in a confined space, without the intervention of third parties or extraneous physical causes. The fire broke out when the plank fell. But in *The Wagon Mound* it was the conduct of the plaintiff's employees which triggered off the ignition of low-grade oil spread out on sea-water more than fifty hours after the defendant's ship had left the vicinity.⁹⁴ The Judicial Committee appeared to have considered the ignition as direct but unforeseeable, though their reference to the question is oddly oblique and casual. Secondly, neither the justice nor the convenience of making foresight the criterion of liability is

⁸⁹ [1961] A.C. 388 at 422.

⁹⁰ The judgment in *The Wagon Mound* is rather ambiguous. In one place it expressly recognises that there are tribunals for which *Re Polemis* is still binding authority: in another it talks about “overruling” that case: see [1961] A.C. 388 at 415 and 420.

⁹¹ *Hughes v. Lord Advocate* [1963] A.C. 837.

⁹² *Doughty v. Turner Manufacturing Co., Ltd.* [1964] 1 Q.B. 518, 528, 532.

⁹³ *Smith v. Leech Brain & Co., Ltd.* [1962] 2 Q.B. 405.

⁹⁴ See the forceful argument of Leon Green, “Foreseeability in Negligence Law” (1961) 61 Col.L.Rev. 1401, 1414.

obvious to everyone. In the areas of duty and standard of care it has produced much uncertainty.⁹⁵ Many also still feel that justice requires that the wrongdoer rather than his innocent victim should bear the loss.⁹⁶

In this state of uncertainty it may be helpful to indicate a number of situations in which it seems clear that the principle in *The Wagon Mound* does not operate. One can often best judge the significance of a decision by observing what is excluded from it.

The principle that reasonable foreseeability is the test of remoteness does not apply:

(1) *When the tort is one of strict liability*

The Judicial Committee itself recognised this exception,⁹⁷ and in *The Wagon Mound* (No. 2)⁹⁸ it was held that both in nuisance and in *Rylands v. Fletcher* the test of remoteness is directness and not foresight.

(2) *When the claim is under the Fatal Accidents Acts, or for loss of services*

It is obvious that the test of remoteness in these torts is not foresight. The question simply is whether the defendant has caused harm of a kind for which the law gives compensation. One who has deprived a family of its bread-winner, or a husband of the consortium of his wife, cannot plead that he reasonably supposed he was injuring a self-employed person or a spinster.

(3) *When the claim is for breach of a strict statutory duty*

The cases clearly show that in actions for (say) the failure to fence dangerous machinery securely foresight of the consequences is irrelevant.⁹⁹

(4) *When the damage which has occurred is not damage of a kind against which it was the duty of the defendant to guard*

The leading case of *Gorris v. Scott*,¹ which has already been considered under the head of breach of statutory duty, is perhaps the best example of this.

⁹⁵ See above, §§ 83–86.

⁹⁶ See *Sivek v. Lambourn* [1964] V.R. 337, 339.

⁹⁷ [1961] A.C. 388, 426–427.

⁹⁸ [1963] 1 Lloyd's Rep. 402.

⁹⁹ See above, § 101.

¹ (1874) L.R. 9 Ex. 125. See above, § 99.

- (5) *When the defendant cannot be said to have caused the damage, although the damage was in fact foreseeable, and a duty was owed to the particular plaintiff*

Cases of this kind must be rare, but a curious example is *Performance Cars Ltd. v. Abraham*.² The defendant was not liable when his car negligently collided with the plaintiff's Rolls-Royce, making necessary a respray at a cost of £75, for at the time of the accident the Rolls needed such a respray as a result of a previous collision with a third party.

- (6) *When the damage which has been caused is damage of the same type or kind that might have been foreseen, but is greater in amount than could have been foreseen*

This is perhaps the most important exception to *The Wagon Mound*. Two distinct questions arise here.

(i) *Type of damage must be foreseen*. It has been made plain that the precise details of the accident, or the exact concatenation of circumstances, need not be foreseen. It is sufficient if the type, kind, degree or order of harm could have been foreseen in a general way.³ The question is, was the accident a variant of the perils originally brought about by the defendant's negligence? ⁴ The law of negligence has not been fragmented into a number of distinct torts.⁵

(ii) *Amount of damage need not be foreseen*. If the damage which occurs is damage of the type or kind which ought to have been foreseen, then it is immaterial that the extent or amount of the damage was unforeseeable. As we have already seen ⁶ there is a distinction between remoteness of damage and measure of damages, and the principle of foreseeability is applicable only to the former head.

The "egg-shell skull" rule

This principle is illustrated by the well-established rule that, at least so far as the physical condition of the victim is

² [1962] 1 Q.B. 93.

³ *Hughes v. Lord Advocate* [1963] A.C. 837.

⁴ *Doughty v. Turner Manufacturing Co., Ltd.* [1964] 1 Q.B. 518. See above, § 88.

⁵ As some dicta in *The Wagon Mound* [1961] A.C. 388, 425-426, might suggest if taken literally.

⁶ Above, § 203.

concerned, abnormal circumstances existing at the time of the wrongful act do not negative causal connection. So if the consequences of a slight personal injury are aggravated by the state of health of the person injured, the wrongdoer is none the less liable to the full extent, though he had no knowledge of that state of health and no reason to suspect it. "If a man," said Kennedy J. in *Dulieu v. White*,⁷ "is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages, that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart."⁸ This is always known as the "egg-shell skull" rule, although there appears to be only one case in which the plaintiff in fact suffered from this peculiar disability.⁹ After a period of uncertainty, it has now been held that *The Wagon Mound* did not affect the "egg-shell skull" rule.¹⁰ The same rule applies when damage has been done to chattels. So we have it on the authority of Sir James Shaw Willes that a case was "tried before me at Newcastle spring assizes, 1859, in which a chemist who sold ointment to rub sheep with was held liable to pay to their owner the whole of their value, £2,000 and upwards, it having killed them; and yet it was hard that a man who could only make a profit of a few pence should be held responsible for so heavy a loss."¹¹

Summary

It may be helpful to try to summarise the law in a number of brief dogmatic propositions, which are based upon the assumption that the decision in *The Wagon Mound* will be followed.

1. Y suffers foreseeable damage as the result of X's activities. X is liable for that damage, whether it is a direct or an indirect consequence of his acts.¹²

2. Y suffers foreseeable damage as the result of X's activities. That damage is much greater in amount than could have been

⁷ [1901] 2 K.B. 669, 679.

⁸ The two preceding sentences were cited with approval in *Barnaby v. O'Leary* [1956] 5 D.L.R. 41, 44. It is curious that there is no direct English decision on the point, though there is one in New Zealand: *Linklater v. Minister for Railways* (1900) 18 N.Z.L.R. 536.

⁹ *Wilson v. Birt (Pty.), Ltd.*, 1963 (2) S.A. 508.

¹⁰ *Smith v. Leech Brain & Co., Ltd.* [1962] 2 Q.B. 405.

¹¹ *Mullett v. Mason* (1866) L.R. 1 C.P. 557, at 561.

¹² *The Wagon Mound* [1961] A.C. 388, 426.

foreseen, but is still in general the kind of damage that could have been foreseen. X is liable for it.¹³

3. Y suffers foreseeable damage as the result of X's activities (e.g., personal injuries). Y also suffers unforeseeable damage as the direct result of those same activities (e.g., he is forced into bankruptcy by reason of his want of means). Y can recover for the former head of loss, but not for the latter.¹⁴

4. Y suffers foreseeable damage as the result of X's activities. Z also suffers direct but unforeseeable damage as the result of those activities. X is liable to Y, but not to Z.¹⁵

§ 209. Effect of an Intervening Act

It remains to consider how far, if at all, the general principles of remoteness of damage are affected by the circumstance that the damage has been brought about by the *novus actus interveniens*¹⁶ of some person other than the defendant himself. In discussing this difficult subject it will be helpful to recall that it is beyond question that human action does not *per se* sever the connected sequence of acts.¹⁷ There are two main views as to the proper test of causation in such a case. The one is that of probability, the other is that of isolation. It is in dealing with the effect of a *novus actus interveniens* that the divergence between these two views is most marked.

(1) The probability test

Salmond's inclination was to accept probability as the true test. That test involves two propositions: first, if a consequence which actually results from the defendant's tort is a probable consequence, then the defendant is liable; secondly, if a consequence which actually results from the defendant's tort is an

¹³ *Smith v. Leech Brain & Co., Ltd.* [1962] 2 Q.B. 405.

¹⁴ *The Wagon Mound* [1961] A.C. 388, 425-426.

¹⁵ *Bourhill v. Young* [1943] A.C. 92; *The Wagon Mound* [1961] A.C. 388.

¹⁶ du Parcq L.J. thought that we could get on equally well without this phrase: *Ingram v. United Automobile Services* [1943] 2 All E.R. 71, 73, but, like the metaphor "chain of causation," it is a conveniently compendious expression and hallowed by long usage. "It has often been said that Latin phrases cannot help to solve problems of causation, but they are sometimes so convenient a label that the careful avoidance of them becomes an inverted kind of pedantry"; *Hogan v. Bentinck West Hartley Collieries (Owners), Ltd.* [1949] 1 All E.R. 588, at 596. *per Lord Normand.*

¹⁷ *The Oropesa* [1943] P. 82, 87; *Woods v. Duncan* [1946] A.C. 401, 442.

improbable consequence, then the defendant is not liable. Now that the decision in *Re Polemis* has been in effect overruled by *The Wagon Mound*¹⁸ the views of Salmond are increasingly likely to be accepted as correct.

(2) The isolation test

The isolation test is best expressed in the words of Lord Sumner in *Weld-Blundell v. Stephens*.¹⁹ "In general (apart from special contracts and relations and the maxim *Respondent superior*), even though A is in fault, he is not responsible for injury to C, which B, a stranger to him, deliberately chooses to do. Though A may have given the occasion for B's mischievous activity, B then becomes a new and independent cause. It is hard to steer clear of metaphors. Perhaps one may be forgiven for saying that B snaps the chain of causation; that he is no mere conduit pipe through which consequences flow from A to C, no mere moving part in a transmission gear set in motion by A; that in a word he insulates A from C." Or in simpler language we may say that if A's original fault has merely created the occasion or opportunity for B's injurious act, A will not be liable.²⁰ It would not appear that it matters whether the *novus actus* be justifiable, lawful, negligent or criminal, or whether it be the act of the plaintiff or of a third party. According to this view, if it be "new and independent," an act of volition, not automatic, reflex or without consciousness of what the actor was doing, the chain of causation will be broken, and the original wrongdoer will be relieved from liability. According to Lord Sumner²¹ it is immaterial that the intervening act is the probable consequence of the defendant's own wrongful act. This, undoubtedly, is a hard saying. If A by his wrongful act exposes B to the risk of injury through the wrongdoing of C, and that risk is so great that a jury regard the result as a natural and probable consequence of A's wrongdoing, it is not easy to see why he should be held exempt from liability for the damage so caused by him. *A fortiori* is this the case when

¹⁸ [1961] A.C. 388. See above, § 208.

¹⁹ [1920] A.C. 956, at 986.

²⁰ *Alford v. National Coal Board* [1952] 1 All E.R. 754, 759.

²¹ *Weld-Blundell v. Stephens* [1920] A.C. 956, 988.

C's action is lawful, for in such a case B has no right of action against anyone for the loss he has suffered.

Salmond was therefore reluctant to accept Lord Sumner's dictum as a correct statement of the law,²² and in view of the severe criticisms passed upon it by the Judicial Committee in *The Wagon Mound*²³ his reluctance would now seem to have been fully justified. There are undoubtedly many decisions which are expressed to rest upon the principle that damage which is the natural and probable consequence of the defendant's wrongdoing is imputable to him notwithstanding an intervening act.²⁴ It may therefore be helpful to distinguish the cases in which the *novus actus* is foreseeable from those in which it is not.

§ 210. Liability where Intervening Act Foreseeable

There appear to be five examples of this.

(1) *Novus actus* intentionally procured by defendant

Clearly the defendant will be liable wherever he has actually authorised or instigated the intervening act,²⁵ or omission.²⁶ He will also be liable if he has intentionally induced or procured the intervening act by putting the necessary means, opportunity, or inducement in the way of him who does it. If A publishes a libel with intent that B shall repeat it, A is responsible for such repetition no less than if he had authorised it.²⁷

²² See 6th ed., s. 36. Yet it should not be forgotten that these statements of Lord Sumner followed a passage in which he had given at least half-a-dozen examples of cases where a defendant would be held responsible despite the intervening act of some third party.

²³ [1961] A.C. 388, 417.

²⁴ See the cases cited below, § 210.

²⁵ Above, § 185.

²⁶ It should be noted that a deliberate omission is just the same in quality as an act of commission. It is a voluntary act: *Harnett v. Bond* [1924] 2 K.B. 517. And Lord Dunedin (dissenting) has suggested that "supine inaction" may be a *novus actus*: *Canadian Pacific Ry. v. Kelvin Shipping Co.* (1927) 136 L.T. 369, 374. See also *Hogan v. Bentinck West Hartley Collieries (Owners), Ltd.* [1949] 1 All E.R. 589; Hart and Honoré, *Causation in the Law*, pp. 131-132.

²⁷ *Weld-Blundell v. Stephens* [1920] A.C. 956, 999. For the problems raised by medical certificates upon which orders are made for the detention of persons of unsound mind, see the Mental Health Act, 1959, s. 141, which affords protection to all persons acting in pursuance of the Act unless they have acted in bad faith or without reasonable care.

(2) Where the novus actus is a natural and probable result of the breach of duty

In some cases the law imposes a duty to take care that harm shall not be caused by the act of a third party. So Greer L.J. in *Haynes v. Harwood* ²⁸ said: "If what is relied upon as *novus actus interveniens* is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence. The whole question is whether or not, to use the words of the leading case, *Hadley v. Baxendale*,²⁹ the accident can be said to be 'the natural and probable result' of the breach of duty." This statement has often been cited with approval. Thus in *Stansbie v. Troman* ³⁰ a householder was obliged to leave a painter working alone in his house. The painter also left the house for about two hours to obtain some wallpaper and (although warned by the householder to shut the front door when he left the house) left the door unlocked. He was held liable for the loss of jewellery stolen by a third party who had entered the house in his absence. It has also long been settled that if a person collects a crowd to the annoyance of his neighbours that may constitute a nuisance, and that it is unnecessary to show that it was his object to create a nuisance, or that it was the inevitable result of his act. It is sufficient to show that the collecting together of the crowd was, according to the common experience of mankind, the probable consequence of his act. It is no defence that the nuisance has been caused by members of the public crowding together to see the defendant's spectacle or performance if that is just what might be expected in the circumstances. So liability has been imposed where a crowd has collected in consequence of an interesting shop-window,³¹ a theatrical success,³² and a racecourse.³³ Another example is the duty imposed on those who send out dangerous chattels. A chemist who sells a

²⁸ [1935] 1 K.B. 146, at 156.

²⁹ (1854) 9 Ex. 341.

³⁰ [1948] 2 K.B. 48. Similar cases are *Davies v. Liverpool Corporation* [1949] 2 All E.R. 175 (unauthorised person giving starting-signal to omnibus driver); *Van Wyzenberghe v. Knockaert* [1954] 4 D.L.R. 510 (owner of motor-car leaving it in gear and giving keys to third party).

³¹ *R. v. Carlile* (1834) 6 C. & P. 636, in which it was questioned whether the beautiful daughter of Mr. Very, a Regent Street confectioner, whose shop was daily beset by admiring crowds, might not have been an indictable nuisance.

³² *Barber v. Penley* [1893] 2 Ch. 447 (*Charley's Aunt*).

³³ *Dewar v. City and Suburban Racecourse Co.* [1899] 1 I.R. 345.

poisonous liquid in a bottle which has been carelessly labelled with the name of some innocuous substance will not be allowed to say that the cause of subsequent disaster was the voluntary act of the ignorant victim who drank it, for that is just what might be expected to happen in those circumstances. A similar principle governs the liability of those who give or lend firearms to young persons: everyone knows they are likely to be meddling and mischievous and to interfere with the trigger or safety-catch.³⁴

“On the other hand, if the proximate cause of the danger is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable.”³⁵ But it may not be easy to prove such an independent conscious act of volition.³⁶ Thus it was once held³⁷ that where the defendant is entitled to rely upon some other person to guard against the dangerous situation which he has created and that other person fails in his duty, his failure may negative the existence of negligence in the defendant. But the more recent cases hold that a defendant who has broken his duty is not entitled to rely on the failure of a third party to notice the breach and take precautions against it.³⁸

(3) Where the intervening actor is not fully responsible

Again the chain of causation is not broken and the consequence is direct if the *novus actus interveniens* is the act of some person who is not fully responsible for his acts, and whose lack of responsibility should have been foreseen, such as a child, a person in a state of excusable ignorance or one in a state of excusable alarm produced by the defendant's own wrongful act³⁹ or a workman in a factory whose senses have been dulled by routine work.⁴⁰ “Children acting in the wantonness of infancy⁴¹ and

³⁴ *Newton v. Edgerley* [1959] 1 W.L.R. 1031, 1035.

³⁵ *Dominion Natural Gas Co. v. Collins* [1909] A.C. 640, at 646, *per Lord Dunedin*.

³⁶ *Philco Radio, Ltd. v. J. Spurling, Ltd.* [1949] 2 All E.R. 882. The defendants misdelivered some crates of highly inflammable material to the plaintiff's premises. A typist aged 19 set fire to it with a cigarette but the Court of Appeal held this was not such a conscious act of volition as would relieve the defendants from liability.

³⁷ *Buckner v. Ashby & Horner* [1941] 1 K.B. 321.

³⁸ *Clay v. A. J. Crump & Sons Ltd.* [1964] 1 Q.B. 533.

³⁹ *Weld-Blundell v. Stephens* [1920] A.C. 956, 985.

⁴⁰ See above, § 199.

⁴¹ As in *Martin v. Stanborough* (1924) 41 T.L.R. 1 (motor-car left on hill); *Shiffman v. Order of St. John* [1936] 1 All E.R. 557 (meddling with ropes

adults acting on the impulse of personal peril ⁴² may be and often are only links in a chain of causation extending from such initial negligence to the subsequent injury. No doubt each intervener is a *causa sine qua non*, but unless the intervention is a fresh, independent cause, the person guilty of the original negligence will still be the effective cause, if he ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his negligence would lead to mischief.” ⁴³

The doctrine of “alternative danger”

One of the most familiar examples in this branch of the law is of a person acting in a state of excusable alarm produced by the defendant’s own wrongful act.⁴⁴ Thus in *Scott v. Shepherd* ⁴⁵ the defendant threw a lighted squib into the market-house at Milborne Port on a fair-day. The squib fell upon the stall of Yates, who sold ginger-bread; one Willis, in order to prevent injury to himself and the goods of Yates, instantly picked up the squib and threw it across the market-place; it landed upon the stall of one Ryal, who also sold ginger-bread, and who in his turn threw the squib to another part of the market-house. On this occasion the squib burst in the plaintiff’s face and destroyed one of his eyes. A majority of the Court of Common Pleas held that the defendant was responsible in trespass. “It has been urged that the intervention of a free agent will make a difference; but I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsory necessity for their own safety and self-preservation.” ⁴⁶

of flag-pole); *Wells v. M.W.B.* (1937) 54 T.L.R. 104 (tampering with valve-box in road). Other cases in which the intervening act of a child has been held not to relieve the defendant from liability are: *Dixon v. Bell* (1816) 5 M. & S. 196, and *Beebe v. Sales* (1916) 32 T.L.R. 413, both of which were cases of liability for dangerous things. See also the cases on contributory negligence of children, above, § 96.

⁴² As in *Scott v. Shepherd* (1773) 2 W.Bl. 892.

⁴³ *Latham v. Johnson* [1913] 1 K.B. 398, at 413, per Hamilton L.J.

⁴⁴ The doctrine of “alternative danger,” as it is sometimes called, is also important in the law relating to contributory negligence: see above, § 96.

⁴⁵ (1773) 2 W.Bl. 892. The plaintiff in this leading case was the grandfather of C. P. Scott, the famous editor of the *Manchester Guardian*: J. L. Hammond, *Life of C. P. Scott* (London, 1934), p. 1.

⁴⁶ *Per De Grey C.J.* at 900. The famous dissenting judgment of Blackstone J. was based on the view that the acts of Willis and Ryal were not such a direct and immediate consequence of Shepherd’s original act as to render

It has been said ⁴⁷ to be desirable to limit the application of this principle to those cases in which the danger is personal danger and the plaintiff or third person has taken "instant action on the first alarm," where the choice has been automatic and without reflection. But the better view is that the doctrine extended to cases in which the plaintiff or third person had acted reasonably and "not unnaturally" and to cases in which the danger was danger to property.⁴⁸

(4) Where the intervening act is done in pursuance of a duty

On the same principle the consequence is direct where the intervening act is that of a person acting under the compulsion of a legal or even only a moral duty. The commonest example is the rescue cases, which we have already discussed.⁴⁹ The action of the rescuer follows naturally and properly in the natural sequence of events from the act of the wrongdoer.⁵⁰

(5) Where the intervening act is done in defence of rights

Again, the chain of causation is not treated as broken when the intervening act is that of a person acting in the exercise or defence of his rights and without intention to injure others.⁵¹ Thus in *Clark v. Chambers* ⁵² the defendant illegally obstructed a highway by placing in it a horizontal bar armed with iron spikes. Some third person, desiring to pass along the road and entitled to do so, removed the obstruction and negligently placed it in an upright position on the footpath. The plaintiff, walking there on a dark night, came in contact with the obstruction, and one of the spikes entered his eye. The damage was held not too remote.

Slander an exception. But as the authorities stand one exception must be admitted to the general rule that a foreseeable *novus actus* does not break the chain of causation. In *Ward v.*

him liable in *trespass*, as distinct from *case*. Denning L.J. said he agreed with Blackstone J.: the *Esso Petroleum Case* [1954] 2 Q.B. 182, 196.

⁴⁷ *Singleton Abbey (Owners) v. Paludina (Owners)* [1927] A.C. 16.

⁴⁸ *Canadian Pacific Ry. v. Kelvin Shipping Co., Ltd.* (1927) 138 I.L.T. 369, 370 (reported *sub nom. The Metagama*, 29 Ll.L.Rep. 253).

⁴⁹ Above, § 14.

⁵⁰ *The Gusty* [1940] P. 159, 165.

⁵¹ A good illustration of the principle is *Clayards v. Dethick* (1848) 12 Q.B. 439, the facts of which are given above, § 13.

⁵² (1878) 3 Q.B.D. 327.

*Weeks*⁵³ it was decided that in an action for slander the defendant cannot be held responsible for damage caused not by the utterance of the defamatory words by the defendant himself but by their unauthorised and unintended repetition by other persons. "It was the repetition," said Sir Nicolas Tindal C.J., "which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage." In these cases the mere fact that it was antecedently probable that the intervening actor would act as he did—"for more than half of human kind are tale-bearers by nature"—did not make the defendants liable.⁵⁴

Finally, some cases of a rather different character where an intervening act will not be held to break the chain of causation must be noted.

(1) *Acts done to minimise damage*

It is the duty of the plaintiff to minimise damage. No act which he does reasonably with that object in view will break the chain of causation. Thus in *Dee Conservancy Board v. McConnell*⁵⁵ a ketch belonging to the defendants sank owing to their negligence and obstructed the navigation of the river of which the plaintiffs were conservators. The defendants abandoned the wreck and the plaintiffs paid £1,500 to have the wreck removed. It was held that they could recover this from the defendants. They were entitled to minimise the damage for the future. The true principle may be that the plaintiff cannot recover damages for an aggravation or prolongation of his injuries which is due to his own neglect or wilful default. "If a man suffering from a sprained leg wishes to win a prize in a high-jumping competition and proceeds to endeavour to win it and thereby makes his leg so much worse that it takes an additional six months to recover, he is only entitled to damages for

⁵³ (1830) 7 Bing. 211.

⁵⁴ *Weld-Blundell v. Stephens* [1920] A.C. 956, 988, at 991, *per* Lord Sumner. But see *Lynch v. Knight* (1861) 9 H.L.Cas. 577, 600; *Speight v. Gosnay* (1891) 60 L.J.Q.B. 231; Holdsworth, H.E.L., viii, p. 358. But see above, § 77.

⁵⁵ [1928] 2 K.B. 159.

such part of his suffering as was not due to such heedless conduct.”⁵⁶

So also a refusal by the plaintiff to accept medical advice or treatment (even when given by the defendant's doctors) may in all the circumstances be unreasonable and so damages should be assessed as if he had undergone the treatment and it had been successful.⁵⁷

Similarly, if the medical attention which the plaintiff receives aggravates his existing injury or causes a new injury, the defendant will probably not be liable if such injury is properly attributable to the actionable negligence of the surgeon or doctor, or some chemical or physical freak occurrence.⁵⁸ But in criminal law it has been held that the chain of causation is not broken by negligent diagnosis and treatment under emergency conditions,⁵⁹ as distinct from the intravenous introduction of large quantities of liquid combined with the injection of terramycin after the deceased had shown himself intolerant to it.⁶⁰ The distinction has been said to rest on the familiar concept of reasonable foreseeability and to be applicable to civil cases.⁶¹ On the other hand, the defendant will be liable if the original injury still subsists, although in an aggravated form, after an operation prudently advised and properly carried out.⁶² Again, if the owner of a damaged chattel (not being a unique object) insists on having it repaired at a cost greatly in excess of the market replacement value, he has not taken reasonable steps to mitigate the damage.⁶³

(2) Concurrent causes

If two direct causes concur and operate at the same time and lead to a common result then there is no *novus actus*, and each actor will be the cause of the damage done. Such was the

⁵⁶ *Jones v. Watney, Combe, Reid & Co., Ltd.* (1912) 28 T.L.R. 399, at 400.

⁵⁷ *McAuley v. London Transport Executive* [1957] 2 Lloyd's Rep. 500.

⁵⁸ As in *Alston v. Marine & Trade Insurance Co., Ltd.*, 1964 (4) S.A. 112, in which the plaintiff suffered a stroke after eating cheese following the administration of the drug parstelin. But why should a plaintiff be obliged to stop eating after an accident? Honoré, Note, (1964) 81 S.A.L.J. 410.

⁵⁹ *R. v. Smith* [1959] 2 Q.B. 35.

⁶⁰ *R. v. Jordan* (1956) 40 Cr.App.R. 152.

⁶¹ Goodhart, Note, 75 L.Q.R. 464.

⁶² *Hogan v. Bentinck West Hartley Collieries (Owners) Ltd.* [1949] 1 All E.R. 588, 596, 607.

⁶³ *Darbishire v. Warren* [1963] 1 W.L.R. 1067.

case in *Burrows v. March Gas Co.*⁶⁴ The defendants negligently allowed gas to leak from a gas-pipe fitted up by them in the plaintiff's shop, and a gasfitter employed by the plaintiff to repair the leak negligently approached it with a lighted candle in his hand, whereupon an explosion occurred which damaged the plaintiff's property. It was held that the plaintiff had a good cause of action against the gas company. No harm would have ensued from the defendant's negligent act but for the subsequent and independent negligence of the gasfitter, but the negligence of the defendants was a continuing negligence.

§ 211. Liability where Intervening Act Unforeseeable

But where the *novus actus* cannot be anticipated, the chain of causation is broken, and the consequences will not be regarded as direct, and then it matters not whether the intervening act is one of wilful wrongdoing, negligent, or lawful. In *Cobb v. Great Western Ry.*⁶⁵ the intervening act was one of wilful wrongdoing. There the defendant company had allowed a railway carriage to be overcrowded, in consequence of which the plaintiff, a passenger, was hustled and robbed. This damage was held to be too remote. In *SS. Singleton Abbey v. SS. Paludina*⁶⁶ the *novus actus* was negligent. There the *Paludina* owing to her negligence dragged her anchors and fell upon the *Singleton Abbey* and parted her moorings so that the *Singleton Abbey* in turn fell upon the *Sara* and cast her adrift. Twenty minutes later the *Sara*, whilst manoeuvring in consequence of the collision, got under the starboard quarter of the *Singleton Abbey*, when the revolving propeller of the *Singleton Abbey* struck the *Sara* with the result that the *Sara* was sunk and the propeller was damaged. It was held in the House of Lords that the negligence of the *Paludina* was not the direct cause of the final collision, since it was not proved that the *Sara* in acting as she did was free from blame. The negligence of the *Paludina* had created the occasion of the injury but had not directly caused

⁶⁴ (1872) L.R. 7 Ex. 96, approved by Lord du Parc in *Grant v. Sun Shipping Co.* [1948] A.C. 549, 568. Cf. *Heskell v. Continental Express* [1950] 1 All E.R. 1033, 1047; *The Carislogie* (1950) 66 T.L.R. (Pt. 2) 685, 691.

⁶⁵ [1894] A.C. 419.

⁶⁶ [1927] A.C. 16.

it. In *Harnett v. Bond*⁶⁷ the *novus actus* was lawful. The plaintiff, who had been detained as a lunatic in a licensed house, whilst granted leave of absence on trial, called upon a commissioner in lunacy. The commissioner, after seeing him, telephoned to the manager of the licensed house that the plaintiff was not in a fit state to be at large, and detained the plaintiff for three hours while the manager sent a motor-car to take the plaintiff back to the licensed house, where he was then detained for nine years. The commissioner was found guilty of false imprisonment, but the damages were limited to the period before the retaking of the plaintiff by the manager. The commissioner could not and did not direct or authorise the manager to retake the plaintiff or confine him in the licensed house; the retaking and confinement were the independent acts of the manager, and each of them was a *novus actus interveniens* sufficient to break the chain of causation.

Voluntary acts of plaintiff whereby loss is intentionally incurred

The *novus actus* is sometimes the act of the plaintiff himself. Damage is made too remote by the *actus interveniens* of the plaintiff when it is a voluntary act by which he intentionally brings that damage upon himself. Thus in the case of the *SS. Amerika*⁶⁸ the Crown sued for the loss of a submarine sunk in a collision by the negligent navigation of the defendant's steamship, and claimed, *inter alia*, the capitalised value of the pensions paid by the Crown to the relatives of the crew of the submarine who were drowned. It was held by the House of Lords that, apart altogether from the rule that an action will not lie at common law for causing the death of a human being,⁶⁹ the damage so claimed was irrecoverable on the ground of remoteness, inasmuch as these pensions were not claimed as of right, but were merely compassionate allowances made at the good pleasure of the Crown. Remoteness in such a case does not depend on whether the *actus interveniens* of the plaintiff is in any way negligent, unreasonable, or otherwise improper, but is based merely on the fact that it is voluntary (that is to say, not under the compulsion of any legal obligation) and that the loss

⁶⁷ [1925] A.C. 669.

⁶⁸ [1917] A.C. 89.

⁶⁹ See below, § 221.

thereby caused is intentional on the plaintiff's part. Such loss he must bear himself, notwithstanding the fact that it would not have been incurred but for the injury inflicted on him by the defendant.

Novus actus where contractual duties

Liability for consequences caused by a *novus actus* in cases in which there is a contract depends upon the terms, express or implied, of that contract. Thus a bailee of goods is bound to use due care for their safety, and if for want of such care they are lost by theft, he cannot plead in defence that the immediate cause of their loss was an act of wilful wrongdoing on the part of the thief.⁷⁰ So in *London Joint Stock Bank v. MacMillan*⁷¹ it was held that a customer of a bank owes to the bank a contractual duty of care so to draw his cheques as not to facilitate an increase of the amount thereof by forgery. "Perhaps the House of Lords will some day explain why, if a cheque is negligently filled up, it is a direct effect of the negligence that someone finding the cheque should commit forgery: while if someone negligently leaves a libellous letter about, it is not a direct effect of the negligence that the finder should show the letter to the person libelled."⁷²

⁷⁰ *Coldman v. Hill* [1919] 1 K.B. 443.

⁷¹ [1918] A.C. 777.

⁷² *Re Polemis* [1921] 3 K.B. 560, at 577, *per* Scrutton L.J.

MEASURE OF DAMAGES IN PARTICULAR TORTS

§ 212. Measure of Damages in Trespass

When a trespass has caused physical damage to the land, the measure of damages is the loss thereby caused to the plaintiff, which in all ordinary cases is measured by the resulting diminution in the value of the property. The measure of damages is not the cost of reinstatement—the cost of restoring the land to the condition in which it formerly was—a cost which may greatly exceed the actual diminution in the value of the land.⁷³ Thus if an old building is pulled down, the plaintiff cannot recover the cost of putting up a new one, but merely the value of the old.⁷⁴ Prospective damages can be recovered.⁷⁵ When a trespass consists in some beneficial use wrongfully made of the plaintiff's land, even if it causes no damage, the plaintiff is entitled to claim by way of damages a reasonable remuneration for that use, as if it had been had under an agreement; and in this remuneration compensation for any damage done to the land will be included.⁷⁶

Measure of damages

If the plaintiff has been deprived of his goods the measure of damages is the value of the goods. If the plaintiff has a limited interest in the goods (*e.g.*, as bailee) he may recover the full value of them, although he will have to account to the owner for what he recovers beyond his own interest.⁷⁷ Where the defendant has an interest in the goods the measure of damages is limited to the value of the plaintiff's interest.⁷⁸ If the plaintiff has not been deprived of the goods, it is the loss actually suffered

⁷³ *Nalder v. Ilford Corporation* [1951] 1 K.B. 822.

⁷⁴ *Lodge Holes Colliery v. Wednesbury Corporation* [1908] A.C. 323.

⁷⁵ *Townend v. Askern Coal Co.* [1934] Ch. 463.

⁷⁶ *Strand Electric Co. v. Brisford* [1952] 2 Q.B. 246 (detention of profit-earning chattel); *E. Marsden (Woodwork Productions), Ltd. v. Colnbrook Trading Co.* [1954] C.L.Y. 890.

⁷⁷ *The Winkfield* [1902] P. 42.

⁷⁸ *Brierly v. Kendall* (1852) 17 Q.B. 937.

as the direct consequence of the trespass, but if the trespass was accompanied by aggravating circumstances the court will not inquire too nicely into the jury's verdict.

Wrongful severance of chattels

When part of the land has been wrongfully severed and turned into a chattel, the value of that chattel is sometimes greater and sometimes less than the resulting diminution in the value of the land. To remove fixtures from a building will probably diminish the value of the building by a greater amount than the fixtures are worth after removal; but coal hewed out of a seam is worth more than it was when *in situ*. In such cases what is the measure of damages—the value of the chattels so taken away, or the resulting diminution in the value of the land? It depends on whether the wrongdoing has been wilful.

(i) Wilful wrongdoing

The rule is that the plaintiff may elect to claim either the one or the other, and he will of course claim the amount which is the larger in the particular case. The chattel, although it has been severed and made into a chattel by the labour and expenditure of the defendant, nevertheless belongs to the plaintiff, who may recover its full value without making any allowance for the fact that part of that value has been given to it by the defendant. The value so recoverable is the value of the chattel at the moment when it first becomes a chattel; and if subsequently the defendant has by his labour or expenditure increased its value, the plaintiff has no claim to this addition.

(ii) No wilful wrongdoing

This penal rule by which the plaintiff recovers more than his actual loss does not apply where there is no fraud or conscious wrongdoing on the part of the defendant. In such a case the plaintiff cannot recover the value of the chattel, and is entitled to nothing more than his actual loss—*viz.*, the diminution of the value of the land. So that if the plaintiff's coal is severed and taken by mistake as to title or boundaries, the measure of damages is the value of the coal in the seam, as if it had been

bought *in situ* by the defendant.⁷⁹ Whether the penal measure of damages applies in the case of negligence as well as in that of fraud is unsettled. There are certain *dicta* in favour of its application to such a case, but it is doubtful whether it would be followed today.⁸⁰

§ 213. The Action for Mesne Profits

Any person wrongfully dispossessed of land has, in addition to a right of action in ejectment for the recovery of the land, a right of action for damages in respect of all loss suffered by him during the period of his dispossession. Such an action is termed an action for mesne profits. A claim for mesne profits is now usually joined with the action of ejectment.⁸¹ The action for mesne profits was a particular form of the action of trespass *quare clausum fregit*; its proper title was the action of trespass for mesne profits. Whether the dispossession had or had not been effected by way of trespass, the claim for mesne profits was always in form a claim for damages for a continuing trespass upon the land. Such a claim was based upon the doctrine of trespass by relation. It followed that the action would not lie until after the plaintiff had re-entered and recovered the possession of the land. But this requirement of re-entry as a condition precedent to an action for mesne profits is now abolished, to this extent only, that a claim for such profits may in all cases be joined with an action of ejectment. The law, then, seems to be as follows: A person dispossessed of land may: (1) Sue in ejectment and for mesne profits in one action; (2) sue for mesne profits, if he has already got back into possession either by means of an action of ejectment or otherwise; (3) sue for mesne profits without ejectment and without recovery of

⁷⁹ *Peruvian Guano Co. v. Dreyfus Bros* [1892] A.C. 166, 173-177; *Townend v. Askern Coal Co.* [1934] Ch. 463.

⁸⁰ See Mayne and McGregor, §§ 688-690, on the whole subject. These principles have been worked out by the courts with exclusive reference to the extraction of coal. The distinction between an innocent and fraudulent defendant is unknown to the law of conversion: *Carton Publishing Co. v. Sutherland Publishing Co.* [1939] A.C. 178, 193. But Salmond thought that there was no reason to doubt that the principles in question were of general application to all forms of wrongful severance and conversion, citing *Peruvian Guano Co. v. Dreyfus Bros.* [1892] A.C. 166, 176. See also Gordon, "Anomalies in the Law of Conversion" (1955) 71 L.Q.R. 347.

⁸¹ R.S.C., Ord. 55, r. 8B.

possession, if his interest in the land has already come to an end.⁸²

Measure of damages

In an action for mesne profits (notwithstanding the name of the action) the plaintiff is not limited to a claim for the profits which the defendant has received from the land, or those which he himself has lost. He recovers all the loss which has resulted from the dispossession.⁸³ Profits are assessable from the date of the writ, not from that of the breach of covenant or other wrong.⁸⁴ It seems not to have been decided whether a defendant in an action for mesne profits can set off the value of improvements made by him to the property in good faith during the period of his possession. Since, however, the plaintiff's claim is for the loss suffered by him in consequence of the dispossession, it would seem clear on principle that he must take into account the value to himself of the improvements made by the defendant. If the defendant has pulled down an old house and built a new one, it can scarcely be supposed that the plaintiff can recover both the new house in an action of ejectment and the value of the old one in an action for mesne profits.

§ 214. The Measure of Damages for Conversion

If a plaintiff relies upon a right of possession he can recover only according to the amount of his interest⁸⁵; but a plaintiff who had actual possession of a chattel is entitled, in an action for the conversion of it, to recover its full value as damages, even although he is not the owner of it, but has merely a limited interest in it. Thus a bailee, agent, or pledgee is entitled not merely to sue for a conversion but to recover in such an action not only the value of his own limited interest but the whole value of the chattel. For the plaintiff is entitled as against the defendant to the possession of the chattel itself. Damages are merely a substitute for such possession and the damages

⁸² *Southport Tramways v. Gandy* [1897] 1 Q.B. 66.

⁸³ *Strand Electric Co. v. Brisford* [1952] 2 Q.B. 246.

⁸⁴ *Elliott v. Boynton* [1924] 1 Ch. 236.

⁸⁵ *Bloxam v. Hubbard* (1804) 5 East 407.

must therefore be the equivalent of the chattel and amount to the full value of it. In other words, the plaintiff in trover is entitled either to the property or to its pecuniary equivalent. The leading case on the subject is *The Winkfield*,⁸⁶ in which the Postmaster-General was held entitled as bailee to recover the whole value of certain mails which were lost through a collision at sea caused by the negligence of the defendants, although the Postmaster-General was under no liability to the parties interested in the lost letters and parcels. The same principle applies in actions for conversions.⁸⁷ The damages so recovered by the plaintiff above the value of his own interest are recovered and held by him on account of the other persons interested in the property, and he is liable to those others in an action for money had and received to their use. In other words, he holds the money which now represents the goods on the same trusts and terms as those on which he held the goods themselves.⁸⁸

Limits of the rule in *The Winkfield*

Inasmuch as a plaintiff with a limited interest recovers and holds the surplus damages on behalf of the other persons interested in the property, it follows that if the defendant himself is one of those persons the plaintiff's claim must be reduced by the amount of the defendant's interest; otherwise we should have the absurdity of A's recovering from B damages which he would have to hold on B's account. So also with any interest vested in some third person to whom the defendant is for any reason not responsible; otherwise A would recover from B on behalf of C damages to which C has no claim. Therefore, if one who is the bailee of a motor-car under a contract of hire-purchase with a finance company sells or pledges it to a third party, the damages payable by him to the finance company for the conversion of its property are limited to the outstanding hire money and the money which would be payable to exercise the option of purchase.⁸⁹

⁸⁶ [1902] P. 42. See also *Morrison Steamship Co. v. Greystoke Castle (Cargo Owners)* [1947] A.C. 265, 298.

⁸⁷ *Swire v. Leach* (1865) 18 C.B.(N.S.) 479.

⁸⁸ *The Winkfield* [1902] P. 42.

⁸⁹ *Whiteley v. Hilt* [1918] 2 K.B. 808; *Underwood v. Bank of Liverpool* [1924] 1 K.B. 776, 794. *Contra*, *United Dominions Trust (Commercial) Ltd. v. Parkway Motors, Ltd.* [1955] 1 W.L.R. 719.

Although it has never been decided, it is presumably the law that a plaintiff entitled under the rule in *The Winkfield* to recover the whole value of the property on account of himself and all other persons interested can do so only if these others stand by and make no objection. A bailee, for example, cannot against the will of his bailor, or an agent against the will of his principal, recover the full value of the property on his behalf. Therefore if the bailor or principal has already received with or without an action the value of his interest from the defendant, it is impossible for the bailee to recover more than his own interest. It seems also to follow that, even though no such prior satisfaction has been made, it is a good defence to an action brought by a plaintiff with a limited interest that a claim has been already made on the defendant by another person interested in the property, and that the action is defended on that person's behalf and by his authority. It is settled that this is a good plea in an action brought by a plaintiff with a merely possessory interest,⁹⁰ and there seems no reason why it should be less effective in a claim by a plaintiff with a limited interest for damages in excess of that interest.

Effect of satisfaction made to bailee

When a defendant has, in accordance with the rule in *The Winkfield*, paid the full value of the property to a claimant with a limited interest, he is probably thereby discharged from all liability to any other person interested in the property.⁹¹ This rule was first put forward in 1874 by Cavendish C.J.⁹² and has never since been disputed, but the matter has been very little considered and involves serious difficulties.⁹³ The rule is clearly otherwise, as we have seen,⁹⁴ in the case of payment to a wrongdoer having a merely possessory title; payment to him, even by compulsion of the law, is no defence against a subsequent claim by the true owner.⁹⁵ What, then, shall be said

⁹⁰ *Biddle v. Bond* (1865) 6 B. & S. 225.

⁹¹ *The Winkfield* [1902] P. 42, 61. See Warren, "Qualifying as Plaintiff in an Action for a Conversion" (1936) 49 Harv.L.Rev. 1084, 1095. *Eastern Construction Co. v. National Trust Co.* [1914] A.C. 197, 210.

⁹² Y.B. 48 Edw. 3, Mich., pl. 8; see Holdsworth, H.E.L., vii, pp. 461-462.

⁹³ *Morrison Steamship Co. v. Greystoke Castle (Cargo Owners)* [1947] A.C. 265, 278, 298.

⁹⁴ Above, § 40.

⁹⁵ *Attenborough v. London and St. Katharine's Dock Co.* (1878) 3 C.P.D. 450, 454.

of payment to a finder, or to a bailee who has already refused to deliver to his bailor? Moreover, since he who buys property from a mere bailee, and pays him for it, has no defence against the bailor in an action for the value, why should he be in a better position if he converts the property and then pays for it? When a bailee recovers the full value of the chattel, he holds it on account of the bailor; why should the risk of the loss of this money by the bailee's misappropriation or bankruptcy lie upon the innocent bailor rather than upon the wrongdoer who converted the property? Conversely, it seems that if a bailor has already been indemnified by the bailee he can none the less recover the full value of the goods in conversion. He would have to account for the sum so recovered to the bailee who had already paid him, but the measure of damages in an action against the wrongdoer would not be affected.⁹⁶

Damages recoverable by possessory owner

Any plaintiff who has a possessory title to property is entitled to recover the same damages for a conversion of it as if his possessory title amounted to legal ownership. When a plaintiff has and relies on a possessory title, the *jus tertii* is no more available as a ground for the reduction of damages than as a defence to the action. As against a wrongdoer a possessory title is to be taken as being a legal one, and it has the same effect.

Assessment of value

In all actions for a conversion the plaintiff may recover, in addition to the value of the property or of his interest in it, any additional damage which he may have sustained by reason of the conversion which is not too remote.⁹⁷ Primarily the value of a chattel is its market price, or if there is no market in such goods, the cost of replacement.⁹⁸ Damages in conversion may be reduced by the return of the chattel converted⁹⁹ and sometimes the plaintiff may be compelled to accept the return of the property. Where there has been a series of conversions of

⁹⁶ *Lancashire & Yorkshire Ry. v. MacNicol* (1919) 88 L.J.K.B. 601, 607.

⁹⁷ *France v. Gaudet* (1871) L.R. 6 Q.B. 199; *The Arpad* [1934] P. 189, 232-236; *Aitken v. Gardiner* (1956) 4 D.L.R. (2d) 119.

⁹⁸ *J. E. Hall, Ltd. v. Barclay* [1937] 3 All E.R. 620.

⁹⁹ *Solloway v. McLaughlin* [1938] A.C. 247; *U.S.A. v. Dollfus Mieg* [1952] A.C. 582, 619.

the same chattel, the return of the chattel by one of the wrongdoers may be used to reduce the damage against each wrongdoer. Further, where the defendant is able to prove that the plaintiff has got back part of the proceeds of the property wrongfully converted he is *pro tanto* excused.¹ But mere receipt of moneys from the wrongdoer will not go in diminution of damages unless the plaintiff has received the benefit of the sum in question and has received it with knowledge of the conversion.² Where there is a doubt about the value of a chattel which has been converted the defendant must either produce it or account for its non-production. If he does not do so, it will be assumed against him that it was of the highest possible value. *Omnia praesumuntur contra spoliatorem*.³

The foregoing rules as to the measure of damages for a conversion apply, *mutatis mutandis*, to actions for any wrongful destruction of or damage to chattels not amounting to conversion.⁴

§ 215. Value Assessed as at Date of Conversion

The value recoverable in an action for conversion is in general the value of the property at the date of the conversion, and not its value at any earlier or later date,⁵ together with any consequential damage which is not too remote to be recoverable.⁶ It is true that in *Sachs v. Miklos* ⁷ the Court of Appeal, purporting to follow its earlier decision in *Rosenthal v. Alderton*,⁸ stated that "the measure of damages is the same in conversion as it is in detainee where the facts are only that the defendant has the goods in his possession and could hand them over but would

¹ *Hiort v. L. & N. W. Ry.* (1879) 4 Ex.D. 188; *Liggett (Liverpool), Ltd. v. Barolays Bank* [1928] 1 K.B. 48.

² *Lloyds Bank v. Chartered Bank* [1929] 1 K.B. 40.

³ *Armory v. Delamirie* (1721) 1 Stra. 505.

⁴ *The Winkfield* [1902] P. 42.

⁵ *Caxton Publishing Co. v. Sutherland Publishing Co.* [1939] A.C. 178, 192-193. Cf. *J. E. Hall, Ltd. v. Barclay* [1937] 3 All E.R. 620; *Martin v. L.C.C.* [1947] K.B. 628.

⁶ *General and Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd.* [1963] 1 W.L.R. 644.

⁷ [1948] 2 K.B. 23.

⁸ [1946] K.B. 374.

not,"⁹ and hence had to be assessed as at the date of the judgment or verdict. But it is submitted that in *Rosenthal v. Alderton* the Court of Appeal asserted only that where the plaintiff has sued in detinue the same principle of assessment applies whether the defendant refuses to return the goods because he has converted them or for some other reason. This assertion (which can hardly be doubted) does not justify the proposition that the measure of damages is the same in conversion as in detinue: the two actions are distinct in their nature and purpose.¹⁰

Effect of rise or fall in value

If the property falls in value after the date of the conversion, even without any act or default of the defendant, he is nevertheless liable to account for its original value, as may happen in the case of shares in a limited company.¹¹ For *non constat* that the plaintiff would not, before such a loss occurred, have sold the property and so obtained the value of it at the time of the sale.

If, on the other hand, the property increases in value after the date of the conversion, a distinction has to be drawn. If the increase is due to the act of the defendant, the plaintiff has no title to it, and his claim is limited to the original value of the chattel. Thus in *Munro v. Willmott*¹² the plaintiff in 1941 deposited a car in the defendant's yard. In 1945, the defendant, after endeavouring without success to communicate with the plaintiff, sold the car, having spent £85 on repairs necessary to put it into a saleable state. The court assessed the value of the car at the date of the judgment as £120, but also held that the defendant was entitled to credit, not from the point of view of payment for what he had done, but in order to arrive at the true value of the property which the plaintiff had lost: if the repairs had not been done the car could only have been sold for scrap. If, however, the subsequent increase of value is not due to the

⁹ Per Lord Goddard C.J. at 38-39. In [1948] 1 All E.R. at 69, Lord Goddard is made to say the exact opposite.

¹⁰ The preceding sentences were cited with approval by Diplock L.J. in *General and Finance Facilities, Ltd. v. Cooks Cars (Romford), Ltd.* [1963] 1 W.L.R. 644, 649. See also Elliott, "Damages in Detinue and Conversion" (1951) 9 N.I.L.Q. 157.

¹¹ *Solloway v. McLaughlin* [1938] A.C. 247, 258.

¹² [1949] 1 K.B. 295, in which Lynskey J. approved the statement of the law in this paragraph. See also *Nash v. Barnes* [1922] N.Z.L.R. 303 (judgment of Sir John Salmond); and Gordon, "Anomalies in the Law of Conversion" (1955) 71 L.Q.R. 346.

act of the defendant, but would have occurred in any case, even had no conversion been committed, the plaintiff is entitled to recover it as special damage resulting from the conversion, in addition to the original value of the property converted: as when goods taken or detained have risen in value by reason of the fluctuation of the market.¹³

§ 216. Effect of Judgment in Action of Conversion

A mere judgment for the value of the property without actual satisfaction does not in any way affect the plaintiff's title to the property.¹⁴ It does not amount to an election to take the pecuniary value of the goods in lieu of the goods themselves. Therefore he may exercise all his rights as owner notwithstanding the judgment, he may seize the chattel either from the defendant or from anyone else in whose hands it is, he may sue a third person for its specific restitution; he may even sue for damages and get a second judgment for the value of the property against a third person in respect of any other conversion committed either before or after the conversion on which the first action was brought. Yet in no case can he by the exercise of such concurrent remedies obtain a double satisfaction. If he actually recovers the property his judgment for its value becomes inoperative; and if he actually receives its value he cannot exercise his right of recaption or enforce his judgment for specific restitution. And if he receives its value from one defendant he cannot enforce his judgment against another.¹⁵

¹³ The preceding sentences were cited with approval by Spence J. in *Aitken v. Gardner* (1956) 4 D.L.R. (2d) 119, 138. They are supported by *Sachs v. Miklos* [1948] 2 K.B. 23: see Mayne and McGregor, *Damages*, pp. 595-596. But Winfield, *Tort*, p. 544, doubts this, as does Elliott, 9 N.I.L.Q. at 170, and Lord Porter reserved his opinion in *Caxton Publishing Co. v. Sutherland Publishing Co.* [1939] A.C. 178, 203. In any event it is clear that if the plaintiff knew or ought to have known of the conversion he cannot claim the benefit of the subsequent rise in value: *Sachs v. Miklos* [1948] 2 K.B. 23. "Just as a plaintiff may not waive a conversion so as to pick his own time to demand return and thus evade being statute-barred, so he may not bide his time after a conversion so as to make his demand when the market price is highest": Kiralfy, 12 M.L.R. at 427.

¹⁴ The judgment may be either for the value alone or for the value with an alternative provision for the return of the property. The rule is the same in either case: *Ellis v. John Stenning & Son* [1932] 2 Ch. 81.

¹⁵ This paragraph was cited with approval by Luxmoore J. in *Ellis v. John Stenning & Son* [1932] 2 Ch. 81, 90.

Although judgment without satisfaction has thus no effect upon the property or upon the rights of the owner of it, a defendant who satisfies a judgment in damages representing the value of goods detained or damages for their conversion acquires thereby such title to the goods as was vested in the plaintiff whose judgment has been satisfied.¹⁶ It amounts to an election on the part of the plaintiff to accept money in lieu of the goods. It is in effect a compulsory purchase of the goods by the defendant. After such satisfaction, therefore, the former owner is deprived of all his rights of recaption and specific restitution. Nor can he sue for damages in respect of any conversion subsequent to satisfaction made. As to any prior conversion, on the other hand, he presumably retains a right to sue for any actual damage sustained by him in consequence of it over and above the value of the goods.¹⁷ Property so divested from the plaintiff by satisfaction made does not necessarily vest in the defendant. It may vest instead in some person who claims under him and therefore has a better title to the property than he has; for example, when A takes property from B and sells it to C, satisfaction made by A to B will vest the property in C. Satisfaction made to a plaintiff in trover does not operate to transfer the ownership of the property save as against the plaintiff himself and as against any other persons whose right of action for damages is barred by the action of the plaintiff.

§ 217. Measure of Damages in Actions for Injuries to the Person ¹⁸

This is a topic of considerable complexity.¹⁹ Because of the great mass of reported cases it is not possible to do more here than indicate the broad general principles governing the matter. In each case the proper computation is a question of fact. "No one knows what is the right sum of damages in any particular

¹⁶ *U.S.A. v. Dollfus Mieg* [1952] A.C. 582, 622.

¹⁷ *Brinsmead v. Harrison* (1871) L.R. 6 C.P. 584.

¹⁸ This section deals with damages in actions of negligence as well as of trespass. For the principles of assessment under the Fatal Accidents Acts, see below, § 221.

¹⁹ See Kemp and Kemp, *The Quantum of Damages in Personal Injury Claims*; Munkman, *Damages for Personal Injuries and Death*; Mayne and McGregor, *Damages*; Street, *Damages*.

case, and no two cases are alike.”²⁰ Hence it is for the judge in his discretion to decide whether he will permit counsel to refer to decisions showing the amount awarded in similar cases,²¹ but in practice such citations are increasingly frequent. It is often discussed whether the governing principle is that of *restitutio in integrum*, or whether the defendant is only obliged to give the plaintiff fair compensation. The truth appears to be that each of these principles of assessment has its own proper sphere of operation. There is no criterion which is universally valid over the whole field of damages. If we examine the cases, we can see that a distinction can be drawn between two main heads of damages. “First, there is what is referred to as special damage which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings generally down to the date of the trial, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future.”²² The principle of *restitutio in integrum* is appropriate to the first of these heads: so far as actual or prospective pecuniary loss is concerned the amount of compensation can be assessed with a degree of accuracy which will go far towards putting the injured person in the same position as he would have been in had he not sustained the wrong. The principle of fair and reasonable compensation is more appropriate to the second of these heads of damage. As the Earl of Halsbury L.C. said in *The Mediana*²³: “Nobody can suggest that you can by any arithmetical computation establish what is the exact sum of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident.” Money cannot renew a shattered human frame.²⁴ Still,

²⁰ *Waldon v. War Office* [1956] 1 W.L.R. 51, at 54, per Singleton L.J.

²¹ *Waldon v. War Office* [1956] 1 W.L.R. 51. (In this case the plaintiff had been left “a wreck who can do nothing for himself”: the C.A. increased the general damages from £12,875 to £17,000.) Specimen awards are collected in Kemp and Kemp, Part II, and in *Current Law*.

²² *British Transport Commission v. Gourley* [1956] A.C. 185, at 206, per Lord Goddard.

²³ [1900] A.C. 118, at 116.

²⁴ *West & Son Ltd. v. Shephard* [1964] A.C. 326, 345.

the law has said that this is a head of damage for which monetary compensation can be awarded and so the court must do the best it can in the light of such comparable cases as it may consider to be of assistance to it.²⁵ We shall now consider the factors relevant to an assessment under each head.

§ 218. Special Damages

These must be pleaded and proved.²⁶ In making the arithmetical calculation in any particular case it is useful to distinguish two lines of authorities—first, those dealing with items with which the plaintiff is entitled to be credited in assessing his out-of-pocket loss, and secondly, those dealing with items with which the plaintiff must be debited for the same purpose. As to the first head, in general the plaintiff is entitled to be credited only with what he has paid or will pay in pursuance of some legal obligation.²⁷ It is uncertain what the position is if the person to whom the obligation is owed has released the plaintiff, or almost certainly will do so, or if some third person has discharged the obligation, or almost certainly will do so.²⁸ As to the second head, the law has adopted a more lenient standard and seems “to have endeavoured to form a kind of moral judgment as to whether it is fair and reasonable that the defendant should have the advantage of something which has accrued to the plaintiff by way of recoupment, or other benefit, as a result of the defendant’s infringement of the plaintiff’s rights.”²⁹ So the proceeds of insurance policies³⁰ or pension schemes are not in general deductible,³¹ nor are voluntary charitable subscriptions.³² On the other hand, if the pension is payable as of right it must be deducted,³³ but not if it is payable at discretion, even though

²⁵ *Rushton v. National Coal Board* [1953] 1 Q.B. 495 (“A dreadful injury; it is the worst case of a loss of an arm that any of us has ever encountered”: but C.A. reduced damages from £10,000 to £7,000); *Walden v. War Office* [1956] 1 W.L.R. 51.

²⁶ *British Transport Commission v. Gourley* [1956] A.C. 185, 206.

²⁷ But see note 36.

²⁸ See Parsons, “Damages in Actions for Personal Injury” (1957) 30 *Austr. L.J.* 618.

²⁹ *Johns v. Prunell* [1960] V.R. 208, at 211, *per* Sholl J.

³⁰ *Bradburn v. G. W. Ry. Co.* (1874) L.R. 10 Ex. 1.

³¹ *Judd v. Hammersmith Hospitals Board* [1960] 1 W.L.R. 328.

³² See below, § 221.

³³ *Browning v. War Office* [1963] 1 Q.B. 750 (American service pension). Yet under the Fatal Accidents Acts such a pension is not deductible: see below, § 221.

it is highly probable that the discretion will be exercised in the plaintiff's favour.³⁴

(1) Expenses

The plaintiff is entitled to recover all expenses actually and reasonably incurred before the date of the trial.³⁵ This will enable him to recover for such items as loss of, or damage to, clothing, medical expenses,³⁶ the cost of lost board and lodging,³⁷ if it really has been lost,³⁸ nursing expenses,³⁹ and loss of a no-claims bonus.⁴⁰

(2) Loss of earnings

The plaintiff is entitled to damages for the loss of the earnings or profits which would normally have accrued to him up to the date of the judgment.⁴¹ But what he is entitled to claim is the loss of what would have been in his pay-pocket—i.e., the net amount after deduction of income tax⁴² and National Insurance contributions.⁴³ Normally the amount can be calculated easily by multiplying the plaintiff's weekly wage or salary by the number of weeks during which he was incapacitated by his injuries.⁴⁴ It also seems that he will be entitled to damages for

³⁴ *Elstob v. Robinson* [1964] 1 W.L.R. 726.

³⁵ Expenses which may crystallise in the future should be claimed as general damages: *Shearman v. Folland* [1950] 2 K.B. 43, 51.

³⁶ Expenditure is not to be impeached on the ground that the plaintiff has not taken advantage of the facilities of the National Health Service: Law Reform (Personal Injuries) Act, 1948, s. 2 (4); *Harris v. Bright's Asphalt Contractors, Ltd.* [1953] 1 Q.B. 617, 635. Sometimes the value of necessary services voluntarily furnished to the plaintiff can be recovered: *Schneider v. Eisovitch* [1960] 2 Q.B. 430; *Gage v. King* [1961] 1 Q.B. 188.

³⁷ *Liffen v. Watson* [1940] 1 K.B. 556.

³⁸ *Johns v. Prunell* [1960] V.R. 208.

³⁹ *Shearman v. Folland* [1950] 2 K.B. 43.

⁴⁰ *Ironfield v. Eastern Gas Board* [1964] 1 W.L.R. 1125n.

⁴¹ Subject to the deduction required by the Law Reform (Personal Injuries) Act, 1948, s. 2: see above, § 200.

⁴² *British Transport Commission v. Gourley* [1956] A.C. 185.

⁴³ *Cooper v. Firth Brown, Ltd.* [1963] 1 W.L.R. 418.

⁴⁴ See the calculation in *Harris v. Bright's Asphalt Contractors, Ltd.* [1953] 1 Q.B. 617. This sum may have to be reduced if there is any possibility that, apart from his injuries, the plaintiff might for some reason have been unable to earn the same wages: *Rouse v. Port of London Authority* [1953] 2 Lloyd's Rep. 179, 184. But if the injured plaintiff is a person legally entitled to be paid wages by his employer during the period of incapacity, he cannot claim under this head, for he has not sustained any loss as a result of the defendant's wrong: *Receiver for Metropolitan Police District v. Croydon Corporation* [1957] 2 Q.B. 154. But see the criticism in Street, *Damages*, pp. 76–82.

prospective loss of earnings between the date of the judgment and the anticipated date of his recovery or death, as the case may be.⁴⁵

But a plaintiff is not entitled to damages for loss of earnings for the years for which he would normally have lived but for his injuries: damages for "the lost years" are part of the general damages for loss of expectation of life.⁴⁶ It seems, therefore, that the total amount awarded to a living plaintiff may well be greater than that obtained by the personal representatives of one who has been killed instantaneously or has died before action brought; for a larger amount may be awarded as compensation for pain and suffering, and also the loss or diminution of earnings during his anticipated duration of life will be a head of assessable damage distinct from the head of loss of expectation of life.

*Damages and tax*⁴⁷

In *British Transport Commission v. Gourley*⁴⁸ the House of Lords held that in assessing damages for loss of personal earnings in cases of personal injury the tax which the plaintiff would have had to pay had he continued to receive those earnings must be taken into account. On the facts of the *Gourley* case itself this meant that the plaintiff recovered £6,695 instead of £37,720. This decision at first seemed novel and inequitable to many: it was not easy to see why the courts should tax when the Revenue did not, particularly when the beneficiary was not the Revenue but the defendant's insurance company. But now it is generally regarded as no more than a logical application of the settled principle that damages are intended to put the plaintiff in the same position as he would have been in had he not received the injury. In the modern world it would be unrealistic for the court to close its eyes to the incidence of taxation. It is true that the court may be called upon to make

⁴⁵ *Harris's Case* [1953] 1 Q.B. 617, 634; *Richards v. Highways Ironfounders (West Bromwich), Ltd.* [1955] 1 W.L.R. 1049, 1068. As these sums have not yet crystallised they must be claimed as part of the general damages.

⁴⁶ *Oliver v. Ashman* [1962] 2 Q.B. 210.

⁴⁷ See Jolowicz, "Damages and Income Tax" [1959] C.L.J. 86; Seventh Report of the Law Reform Committee (Cmd. 501, H.M.S.O., 1958).

⁴⁸ [1956] A.C. 185.

elaborate calculations, especially if surtax or foreign income taxes are involved, but the courts are not unfamiliar with complex arithmetical computations, and there is the authority of Earl Jowitt for saying that the estimate "will be none the worse if it is formed on broad lines, even though it may be described as rough and ready."⁴⁹

Two criticisms have been made of the decision in *Gourley*, but neither seems justifiable.⁵⁰ One is that it is wrong that the defendant should profit from the fact that the plaintiff is in a high tax bracket. The answer to this is that damages in tort are in general compensatory and not punitive and that the defendant can hardly be supposed to have selected on purpose a plaintiff who was a large taxpayer. Another criticism is that a person whose earning capacity is wholly or partially destroyed thereby loses a capital asset, and as it is a fundamental principle of English revenue law that a capital asset is not taxable, it should follow that the compensation which replaces that asset is also tax-free. But while it is true that a man's skill and experience are in the nature of capital assets, all that was done in *Gourley* was to value those assets by the income which they were likely to produce, and that income was affected by the predictable factor of taxation.

It therefore seems that the Law Reform Committee were correct in refusing to recommend any change in the law.⁵¹ The principle in the *Gourley* case applies to actions for damages for wrongful dismissal,⁵² for trespass and conversion,⁵³ and for statutory compensation for compulsory acquisition.⁵⁴ It follows also that a plaintiff may be compelled to disclose particulars of his tax position.⁵⁵

⁴⁹ [1956] A.C. 185, at 203.

⁵⁰ See Sir Edwin Herbert in *Record of the Second Commonwealth Law Conference* (London, 1962), p. 497.

⁵¹ Cmnd. 501.

⁵² *Parsons v. B.N.M. Laboratories, Ltd.* [1964] 1 Q.B. 95. *Aliter* if the damages exceed £5,000, for then (exceptionally) they are taxable under the Finance Act, 1960, ss. 37-38, which attempted to discourage "golden handshakes."

⁵³ *Hall & Co. v. Pearlberg* [1956] 1 W.L.R. 244.

⁵⁴ *West Suffolk C. C. v. Rought* [1957] A.C. 403.

⁵⁵ *Phipps v. Orthodox Unit Trusts* [1958] 1 Q.B. 814.

§ 219. General Damages

(1) Pain and suffering

General damages may be awarded for the pain and suffering⁵⁶ which the plaintiff has undergone in the past and is likely to undergo in the future.⁵⁷ This may include a substantial sum for the mental agony due to the plaintiff's appreciation of the fact that his life has been shortened.⁵⁸ But in the absence of clear evidence of reasonably prolonged suffering there should be no award under this head.⁵⁹

(2) Loss of amenities of life

Here everything must depend upon the nature of the injury and the circumstances of the particular plaintiff. A young and active man who has been blinded or crippled might recover substantial damages under this head. "The joy of life will have gone from him. He cannot ride a bicycle, cannot kick a football."⁶⁰

If the plaintiff has actually been deprived of the amenities of life, it is irrelevant that he cannot appreciate this fact, or that he cannot use or enjoy the damages awarded to him. So in *West (H.) and Son, Ltd. v. Shephard*⁶¹ the plaintiff had been rendered partially unconscious and totally paralysed as a result of the defendant's negligence. She needed full-time nursing, and her expectation of life was reduced to five years. The House of Lords refused to interfere with an award of £17,500 for loss of amenities and £500 for loss of expectation of life. Her "grave and sombre deprivation"⁶² entitled her to substantial compensation: unconsciousness was relevant only in respect of

⁵⁶ There does not seem to be any clear distinction between the two terms in this composite phrase: Mayne and McGregor, *Damages*, § 43.

⁵⁷ *Heaps v. Perrite, Ltd.* [1937] 2 All E.R. 60.

⁵⁸ *Oliver v. Ashman* [1962] 2 Q.B. 210.

⁵⁹ *Bishop v. Cunard White Star, Ltd.* [1950] P. 242, 247. See *Harris v. Bright's Asphalt Contractors, Ltd.* [1953] 1 Q.B. 617 ("terrible injuries and suffering": £5,000) and *Winkworth v. Hubbard* [1960] 1 Lloyd's Rep. 150 (£15,000 for Canadian stockbroker) for examples of such awards.

⁶⁰ *Heaps v. Perrite, Ltd.* [1937] 2 All E.R. 60, per Greer L.J. (loss of both hands: £10,000); *Waldon v. War Office* [1956] 1 W.L.R. 51.

⁶¹ [1964] A.C. 826.

⁶² [1964] A.C. 826, at 851, per Lord Morris of Borth-y-Gest.

those heads of damage which can be felt or appreciated—*e.g.*, pain and suffering.⁶³

(3) Damages for shortened expectation of life

In *Flint v. Lovell*⁶⁴ an exceptionally active gentleman of sixty-nine years was knocked down by the defendant's motor-car and his doctor said that he could now no longer look forward to more than a year of invalid life.⁶⁵ The Court of Appeal held that he might recover as an independent head of damage compensation for the shortening of his normal expectation of life. To many lawyers this seemed a novel head of damage and they considered that damages for shortened expectation of life had hitherto been only taken into account as a subjective element in awarding damages for pain and suffering.⁶⁶ But two years later in *Rose v. Ford*,⁶⁷ when the administrator of a girl of twenty-three, who died four days after a collision between two motor-vehicles, claimed such damages as part of her estate under the Law Reform (Miscellaneous Provisions) Act, 1934, the House of Lords held that *Flint v. Lovell* was rightly decided.

The chaos which might have been anticipated prevailed in courts of first instance, not much relieved by a number of judgments in the Court of Appeal. In *Benham v. Gambling*⁶⁸ the opportunity of clarifying the law in this respect⁶⁹ was seized. The House of Lords reduced an award of £1,200 in respect of a child two-and-a-half years old to £200, and in a judgment concurred in by six other Law Lords Viscount Simon L.C. corrected the methods of estimating this head of loss which had grown up

⁶³ There can be no award under this head in a case in which there was no evidence that the plaintiff appreciated his dreadful state, *e.g.*, *Wise v. Kaye* [1962] 1 Q.B. 638.

⁶⁴ [1935] 1 K.B. 354.

⁶⁵ In the event he was still alive three years later: [1937] A.C. at 833.

⁶⁶ The passage to this effect in the 9th edition of this book (at p. 363) was adopted as a part of his argument by unsuccessful counsel in *Rose v. Ford*. On the whole problem, see Allen, "Is Life a Boon?" (1941) 57 L.Q.R. 462; Langton, "Damages for Loss of Expectation of Life" (1942) 58 L.Q.R. 53; Kahn-Freund, "Expectation of Happiness" (1942) 5 M.L.R. 81; Goodhart, 82 L.J.(N.) 253, 311.

⁶⁷ [1937] A.C. 826.

⁶⁸ [1941] A.C. 157, 168.

⁶⁹ The decision was not intended to give guidance on the different question of the assessment of damages for loss of the amenities of life: under this head much more generous awards are permissible: *West (H.) & Son, Ltd. v. Shephard* [1964] A.C. 326.

in a series of earlier cases and approved a standard of measurement which has resulted in lower and more uniform awards being given. (1) The main rule is that, whether in the case of a child or an adult, very moderate figures should be chosen. "In putting a money value on the prospective balance of happiness in years that deceased might otherwise have lived, the jury or judge of fact is attempting to equate incommensurables."⁷⁰ (2) The sum given is not to be determined by applying a statistical or actuarial test as to the number of days or years of life of which the individual has been deprived. For "the thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life."⁷¹ The loss of a measure of prospective happiness was thereby in effect substituted for the shortening of life as the true head of damage in these cases,⁷² but in these cases alone.⁷³ Hence the prospect of a predominantly unhappy life may justify a lower award than usual.⁷⁴ (3) But, though the court must be satisfied that the circumstances of the individual life were calculated to lead on balance to a positive measure of happiness (based on the character or habits of the individual) the test is objective, and not subjective. The estimate of what kind of future on earth the victim might have enjoyed is not the estimate which the victim himself may have made but that which should be made objectively. It follows from this that it is also irrelevant that the plaintiff has suffered mental injuries which make it impossible for him to realise what he has lost.⁷⁵ (4) The appropriate figure should be reduced in the case of a very young child. (5) The social position of the

⁷⁰ *Benham v. Gambling* [1941] A.C. at 168.

⁷¹ *Ibid.* at 166. This means that "where men in the prime of life are concerned the measure of damages does not vary with the number of years of the allotted span which may be said to lie in front of the deceased".

Bishop v. Cunard White Star, Ltd. [1950] P. 240, at 246, *per* Hodson J.
⁷² This "hedonistic philosophy" has been disapproved in Alberta: *Maltais v. Canadian Pacific Ry.* [1950] 2 W.W.R. 145; and in Manitoba "we take it for granted—and I think properly—that an average child of five years has prospects for a long, satisfactory and valuable life": *Anderson v. Chasney* [1949] 4 D.L.R. 71, at 97, *per* Adamson J.A.

⁷³ In *Wise v. Kaye* [1962] 1 Q.B. 638 Diplock L.J. (dissenting) made a striking attempt to restate the whole law under the general principle of loss of happiness. But a majority of the H.L. refused to accept this in *West (H.) & Son, Ltd. v. Shephard* [1964] A.C. 326.

⁷⁴ *Jordan v. Mullis* [1952] C.L.Y. 905 (deceased living apart from his wife, who, as a Roman Catholic, would not divorce him).

⁷⁵ *Wise v. Kaye* [1962] 1 Q.B. 638; *West (H.) & Son, Ltd. v. Shephard* [1964] A.C. 326.

victim, his prospects of worldly possessions, the financial losses or gains of which he has been deprived are to be excluded from consideration. "Lawyers and judges may here join hands with moralists and philosophers and declare that the degree of happiness to be attained by a human being does not depend on wealth or status."⁷⁶ Hence the only relevance of sums which would have been earned by the deceased during the period which has been cut off from his life is that they are an element for consideration in the sense that a person earning a reasonable livelihood is more likely to have an enjoyable life.⁷⁷ The principle laid down in *Benham v. Gambling* is applicable whether the victim has died before action brought or before judgment (as in *Benham v. Gambling* itself), or is alive and suing in his own right.⁷⁸ Finally, although the courts can take into account the depreciation of the value of money since *Benham v. Gambling*,⁷⁹ the present tendency is to award sums of a very moderate nature.⁸⁰ There is also the practical point that the plaintiff is often not concerned to argue strongly for a high figure, as the Law Reform Act damages will be deducted from a Fatal Accidents Act claim.

Functions of an appellate court

There is here an important but not very convincing⁸¹ difference between trial by judge and jury and trial by a judge sitting alone. On an appeal from a judge the Court of Appeal rehears the case and has the power to correct erroneous judgments, but on an appeal from the verdict of a jury there is no power of correction but only of supervision.⁸² When the verdict is that of a jury, it

⁷⁶ *Benham v. Gambling* [1941] A.C. 157, at 167.

⁷⁷ *Oliver v. Ashman* [1962] 2 Q.B. 210.

⁷⁸ As in *Harris v. Bright's Asphalt Contractors, Ltd.* [1953] 1 Q.B. 617, in which £500 was awarded to a plaintiff "who had an A1 prospect of life" reduced to two years by the negligence of the defendant.

⁷⁹ *Glasgow Corporation v. Kelly*, 1951 S.C. 15; [1951] 1 T.L.R. 845.

⁸⁰ Thus in *Corfield v. Groves* [1950] 1 All E.R. 488, Hilbery J. awarded £5,249 under the Fatal Accidents Acts and £1 under the Law Reform (Miscellaneous Provisions) Act, 1934. It has been said that £500 should be the maximum figure: *Garcia v. Harland & Wolff* [1948] 2 All E.R. 477, 486. But the better view is that it is impossible to lay down any figure which even appears to limit the discretion of the court by mathematical rules: *Ware v. Cunard White Star, Ltd.* (1950) 84 Ll.L.Rep. 59, 61. In this case it was said that £800 was the normal figure for a man in the prime of life.

⁸¹ See Harman L.J. in *Warren v. King* [1963] 3 All E.R. 521, 528.

⁸² *Warren v. King* [1963] 3 All E.R. 521, 530.

will only be set aside if the appellate court is satisfied that the amount of damages is such that it is out of all proportion to the circumstances of the case.⁸³ But an award by a jury cannot be attacked simply on the ground that it is out of conformity with whatever pattern may have emerged from the decisions of judges in comparable cases.⁸⁴ One reason for this is that as the law prohibits the jury being informed about comparable cases it can hardly complain if their award diverges from them. Another reason is that the views of juries may form a valuable corrective to the views of judges. If a court goes on pitting its judgment against that of a jury it would render trial by jury nugatory.⁸⁵ A difficult situation would arise if another jury on a retrial independently awarded the same or a higher amount.⁸⁶ Still, "to say, as judges have come as near to saying as decorum permits, that juries must find a figure as best they can and escape criticism by being anonymous and dumb and accordingly proof against everything but 'perversity,' is a poor position in which to leave the matter."⁸⁷ So the rule of practice now is that in order to achieve uniformity trial before a judge sitting alone should be ordered unless there are exceptional circumstances.⁸⁸

When the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but generally there is so much room for legitimate difference of opinion that the appellate court will be slow to interfere. "It must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."⁸⁹ It has been said that the court

⁸³ *Davies v. Powell Duffryn Associated Collieries, Ltd.* [1942] A.C. 601, 616. But the C.A. has said that in future it will review such awards more readily: *Ward v. James* [1965] 2 W.L.R. 455.

⁸⁴ *Scott v. Musial* [1959] 2 Q.B. 429.

⁸⁵ [1959] 2 Q.B. 429, 434.

⁸⁶ *McCarey v. Associated Newspapers, Ltd.* [1964] 3 All E.R. 947, 961.

⁸⁷ *Admiralty Commissioners v. S.S. Chekiang (Owners)* [1926] A.C. 637, at 643, per Lord Sumner.

⁸⁸ *Ward v. James* [1965] 2 W.L.R. 455.

⁸⁹ *Nance v. British Columbia Electric Ry. Co., Ltd.* [1951] A.C. 601, at 613, per Viscount Simon.

would interfere if it said to itself "Good gracious me—as high as that."⁹⁰

Reforms

Some changes seem possible. One is the abolition of the rule of practice which prevents a plaintiff from claiming a specific sum. Hilbery J. said that although "Nobody on the High Court Bench has as long an experience as I have of such cases as these,"⁹¹ it would be "enormously helpful" if it were abolished. Another is the abolition of the rule of law which prevents a plaintiff from telling the jury that the defendant is insured—even though it is a traffic case, in which everyone in court knows the defendant commits a serious criminal offence if he is not insured. Glyn-Jones J. said that he "was not going to be bound by the old-fashioned rule, which had long outlived its usefulness."⁹² Again, there seems no reason why the court should not have the assistance of an actuary in estimating the cost of an annuity to bring in the desired annual sum over the years which are left to the plaintiff.⁹³ Other helpful suggestions are that there should be two trials—one on liability soon after the accident, when the events are fresh in the minds of witnesses, and the other on damages at a later date, when the extent of the loss will be more clearly manifest⁹⁴: or that damages should no longer be awarded in a lump sum, but an interim payment ordered which can be increased or decreased later as circumstances may require.⁹⁵

§ 220. Measure of Damages when Personal Representative Sues

In general, as the cause of action is that of the deceased, damages are recoverable under the same heads and assessable

⁹⁰ *McCarthy v. Coldair, Ltd.* [1951] 2 T.L.R. 1226, at 1229, *per* Denning L.J. For an example, see above, n. 25. If it is said that the award is unreasonable, this means, not that the court below was unreasonable, but that having regard to the relevant principles of assessment, the court below has arrived at a result not reasonably in accord with those principles: *M'Leish v. Fulton & Sons*, 1955 S.C. 46, 50.

⁹¹ *Mitchell v. Metcalf*, *The Times*, November 6, 1958. The Rt. Hon. Sir Malcolm Hilbery (b. 1883) was on the High Court Bench from 1935 to 1962.

⁹² *Morey v. Woodfield*, *The Times*, July 11, 1961 (£50,000 for a girl of 14 completely paralysed; upheld on appeal: [1963] 3 All E.R. 538).

⁹³ *Morey v. Woodfield* [1963] 3 All E.R. 538, 536; Street, *Damages*, Chap. 5.

⁹⁴ This has the support of the Law Society.

⁹⁵ See Cripps, q.c., *The Times*, September 7, 1964.

according to the same standards as if the deceased were still alive.⁹⁶ Thus damages may be recovered for loss of earnings, pain and suffering, medical and hospital expenses (if incurred), and loss of expectation of life. Exceptions may be found in section 1 (2) of the Law Reform (Miscellaneous Provisions) Act, 1934, which provides that, when the executor or administrator is plaintiff, the damages recoverable for the benefit of the estate:

- (1) shall not include exemplary damages,⁹⁷
- (2) where the death has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to the estate consequent on the death, except that a sum in respect of funeral expenses may be included.⁹⁸ Thus if the death is that of a person entitled to an annuity or a life interest, the loss of the annuity or the life interest must be disregarded in calculating the damages, and similarly if the deceased's life was insured the receipt of the insurance moneys will be disregarded. Deductions may also have to be made if the death of the injured party was due partly to his own contributory negligence,⁹⁹ or if before his death he received benefits from the National Insurance authorities.¹

Duplication of damages ²

The Act expressly provides by section 1 (5) that the rights for the benefit of the estates of deceased persons are in addition to and not in derogation of the rights conferred on dependants by the Fatal Accidents Acts and the Carriage by Air Act, 1961. What, then, is the position where those who benefit under the Fatal Accidents Acts are the same persons as those who benefit under the will or on intestacy under the Law Reform Act? It has been made clear that there can be no duplication of damages.³

⁹⁶ See above, § 219.

⁹⁷ Note that since *Rookes v. Barnard* [1964] A.C. 1129 the scope of exemplary damages has been severely limited. ⁹⁸ s. 1 (2).

⁹⁹ Law Reform (Contributory Negligence) Act, 1945, s. 1 (4).

¹ Law Reform (Personal Injuries) Act, 1948, s. 2 (1).

² Mayne and McGregor, *Damages*, §§ 846-848; Street, *Damages*, pp. 158-164. The difficult questions discussed here are perhaps less frequent now that a widow is entitled absolutely to the first £5,000 of the estate on intestacy.

³ *Davies v. Powell Duffryn Collieries* [1942] A.C. 601, 623.

If the action under the Law Reform Act is brought first or at the same time as the action under the Fatal Accidents Act (as it normally is) the damages recovered under the latter Acts will be *pro tanto* reduced, for the Law Reform damages will be a benefit accruing to the dependants as a result of the deceased's death.⁴ But if the action under the Fatal Accidents Acts is brought first then the possibility of any Law Reform Act damages coming to the plaintiff defendants must be taken into account.⁵ But Law Reform Act damages themselves cannot be reduced by anything which the dependants may recover,⁶ indeed, in practice they are often substantially less.

§ 221. The Fatal Accidents Acts, 1846 to 1959⁷

The rule that no man has any legally protected interest in the life of another has been to a great extent derogated from by statute, but it still remains the general principle, the Fatal Accidents Act, 1846, otherwise known as Lord Campbell's Act, having merely established special exceptions to it. Section 1 of that Act provides as follows: "Whosoever the death of a person shall be caused⁸ by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused

⁴ *Rose v. Ford* [1937] A.C. 826, at 835; *Davies v. Powell Duffryn Collieries* [1942] A.C. 601. But it is best to claim the whole of the damages under the Fatal Accidents Acts: *Hutchinson v. L. & N. E. Ry.* [1942] 1 K.B. 481, 491. For the damages recovered under the Law Reform Act are subject to death duties, whereas those recovered under the Fatal Accidents Acts are not: *Hall v. Wilson* [1939] 4 All E.R. 85, 86; *Feay v. Barnwell* [1938] 1 All E.R. 31, 36. (But note that death duties are not payable on estates worth less than £5,000.) Also damages recovered under the Law Reform Act are subject to the claims of creditors, so that if the estate is insolvent no deduction will have to be made. Indeed, there is much to be said for the view that Law Reform Act damages are a needless complication and should be abolished: Winfield, *Tort*, p. 143.

⁵ *Davies v. Powell Duffryn Collieries, Ltd.* [1942] A.C. 601, 608.

⁶ [1942] A.C. 601, 615.

⁷ See Kemp and Kemp, *The Quantum of Damages*, Vol. ii; Mayne and McGregor, *Damages*, Chap. 35; Street, *Damages*, Chap. 6.

⁸ Foresight is irrelevant in an action under the Fatal Accidents Acts: causation alone is the test: *Haber v. Walker* [1953] V.R. 389.

under such circumstances as amount in law to a felony." The action is brought in the name of the executor or administrator for the benefit of certain near relatives of the deceased, if those relatives have suffered a pecuniary loss in consequence of his death.⁹ The following points on the interpretation of the Act should be noted:

(1) What relatives are covered

The relatives whose interests are thus protected are, by section 5, the following: Husband, wife, children, grandchildren, stepchildren, father, mother, step-parents, and grandparents. By section 1 (1) of the Fatal Accidents Act, 1959, the class of dependants also includes any person who is, or who is the issue of, a brother, sister, uncle, or aunt of the deceased person. By section 1 (2) illegitimate and adopted children are for the purposes of the Acts to be deemed to be children, any relationship by affinity is to be treated as a relationship by consanguinity, and any relationship of the half-blood as of the whole blood. Posthumous children also come under the Act.¹⁰

(2) The action

Only one action is to be brought in the name of the deceased's personal representative,¹¹ giving full particulars of the persons for whose benefit the action is brought.¹²

The action must be brought within three years (or, in the case of loss of life by collision at sea, within two years) after the death by the executor or administrator of the deceased on behalf of the relatives; but if there is no executor or administrator, or if he does not commence an action within six months, any relative entitled to the protection of the Act may sue in his own name on behalf of himself and the others.¹³

⁹ It has been held that an action will lie if the deceased committed suicide as a result of insanity caused by the defendant's negligence: *Pigney v. Pointers Transport Services* [1957] 1 W.L.R. 1121.

¹⁰ *The George and Richard* (1871) L.R. 3 A. & E. 466.

¹¹ Fatal Accidents Act, 1846, s. 2.

¹² s. 4. See *Cooper v. Williams* [1963] 2 Q.B. 567.

¹³ Fatal Accidents Act, 1846, s. 3, as amended by Fatal Accidents Act, 1864, s. 1 and Law Reform (Limitation of Actions, etc.) Act, 1954, s. 3; Maritime Conventions Act, 1911, s. 8. The relatives may sue even within six months if there is no executor or administrator: *Holleran v. Bagnell* (1879) 4 L.R. Ir. 740; *Hilton v. Sutton Steam Laundry* [1946] K.B. 65.

(3) Damages not part of the deceased's estate

The amount recovered is not part of the estate of the deceased so as to be liable for death duties or debts. The executor or administrator recovers it, not in his ordinary capacity as the personal representative of the deceased, but in a special capacity in right of the relatives.¹⁴

(4) Deceased himself must have been able to sue

There is no right of action unless the deceased himself could have sued had he been merely injured by the defendant's act and not killed. Therefore, if he has in his lifetime, in the interval between the accident and his death, accepted full compensation from the defendant and so extinguished his right of action, his relatives cannot sue in respect of his death.¹⁵ The same result follows if he agreed to take the risk of the accident on himself so as to exclude any right of action in accordance with the maxim *Volenti non fit injuria*,¹⁶ or if at the time of his death the Limitation Act, 1954, had already run against him.¹⁷ If the deceased has been guilty of contributory negligence, the Law Reform (Contributory Negligence) Act, 1945, s. 1 (4), provides that the damages awarded under the Fatal Accidents Acts may be reduced proportionately,¹⁸ and the same rule applies by analogy if a plaintiff dependant has been guilty of contributory negligence.¹⁹

(5) A new cause of action

Nevertheless the cause of action conferred upon the relatives of the deceased by the Act is a new cause of action and not merely a continuance of that which was formerly vested in the deceased himself. It is "new in its species, new in its quality, new in its principle, in every way new."²⁰ The measure of damages may be entirely different: the deceased, if alive, could only have recovered damages for his personal injuries; the

¹⁴ *Marginson v. Blackburn B.C.* [1939] 2 K.B. 426.

¹⁵ *Read v. Gt. Eastern Ry.* (1868) L.R. 3 Q.B. 555. *Aliter* if he has merely agreed to limit the amount of liability: *Nunan v. Southern Ry.* [1924] 1 K.B. 223; *Grein v. Imperial Airways* [1937] 1 K.B. 50.

¹⁶ *Griffiths v. Dudley (Earl of)* (1882) 9 Q.B.D. 357.

¹⁷ *British Columbia Electric Ry. v. Gentile* [1914] A.C. 1084, 1042.

¹⁸ See Williams, *Joint Torts and Contributory Negligence*, pp. 440 *et seq.*

¹⁹ *Mulholland v. McCrea* [1961] N.I. 135.

²⁰ *The Vera Cruz* (1884) 10 App.Cas. 59, at 70, *per* Lord Blackburn.

relatives recover substantially for the loss of their bread-winner. This is strikingly illustrated by the fact that the relatives may recover even though their bread was won by illegal means.²¹ So again, if the period of limitation under the Limitation Act, 1954, was not complete as against the deceased at the date of his death, it cannot be completed afterwards so as to bar the claim of the relatives under the Act. This claim is subject to its own period of limitation as fixed by the Act itself and commencing on the death of the deceased, and is not subject to the provision of the Limitation Act, 1954, affecting the claim of the deceased himself.²²

(6) Method of assessing damages

In the difficult task of estimating the amount of damages to be awarded the courts often find help in the principles enunciated by Lord Wright in *Davies v. Powell Duffryn Associated Collieries, Ltd.*²³: "It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend upon the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt." But at the end of the day arithmetic may have to be mitigated by common sense.²⁴

Some particular applications of these principles must be mentioned:

(i) The estimate of the probable length of the deceased's earning period should be the basis for the computation of the plaintiff's loss. This will serve to fix the upper and the lower limits of his claim, for it is impossible to compute the loss on a

²¹ *Le Bagge v. Buses* [1958] N.Z.L.R. 630.

²² *Venn v. Tedesco* [1926] 2 K.B. 227.

²³ [1942] A.C. 601, at 617.

²⁴ *Daniel v. Jones* [1961] 1 W.L.R. 1103.

strictly arithmetical or actuarial basis.²⁵ Hence no definite figure can be chosen as a multiplier which will give a correct result in all cases: the court has a discretion in the matter. But probably sixteen years' purchase is near the upper limit.²⁶ Whatever figure is chosen ought not to be materially reduced by reason of the hazardous nature of the deceased's occupation in life.²⁷ There are many other factors which may serve to increase or decrease the multiplier.²⁸

(ii) There is no right of action on behalf of any relative who cannot show some pecuniary loss in consequence of the death of the deceased.²⁹ Nothing can be claimed merely by way of *solatium* for mental suffering and bereavement, nor is there any action for nominal damages in the absence of proof of actual loss.³⁰ There is, however, a sufficient pecuniary loss if the claimant can show some reasonable expectation of pecuniary benefit from the continuance of the deceased's life³¹; and it is not necessary that the benefit should be derived from the deceased as a matter of right, for a reasonable expectation of voluntary bounty is enough.³² Thus a husband can recover damages for the death of his wife in respect of the loss of the pecuniary value of her domestic services.³³

Damages can be assessed under two distinct heads.³⁴ First, in respect of the sums which the deceased would probably have applied out of his income to the maintenance of his dependants; and secondly, in respect of such portion of any additional savings which he might have accumulated during the period for which.

²⁵ *Nance v. British Columbia Electric Ry.* [1951] A.C. 601, 614–617; *Lander v. Sorenson* [1955] N.Z.L.R. 219, 229. The latter case also shows that there is no obligation on a plaintiff to injure his own person or property in order to mitigate damages.

²⁶ *Brennan v. Gale* [1949] N.I. 178.

²⁷ *Bishop v. Cunard White Star, Ltd.* [1950] P. 240, 248.

²⁸ For example, that a dependent widow may re-marry, or the decline in the purchasing power of the pound.

²⁹ *Blake v. Midland Ry.* (1852) 18 Q.B. 93.

³⁰ *Royal Trust Co. v. C.P.R. Co.* (1922) 88 T.L.R. 899.

³¹ *Taff Vale Ry. v. Jenkins* [1913] A.C. 1; *Baker v. Dalgleish Steam Shipping Co.* [1922] 1 K.B. 361.

³² *Franklin v. S. E. Ry.* (1858) 3 H. & N. 211.

³³ *Berry v. Humm & Co.* [1915] 1 K.B. 627.

³⁴ *Nance v. B.C. Electric Ry. Co.* [1951] A.C. 601, 614; *Pannell v. Fischer* [1959] S.A.S.R. 77

but for the accident, he would have lived. Tax must be taken into account.³⁵

On the other hand, the fact that the dependant has private means is irrelevant, except insofar as it shows the amount of pecuniary benefit received from the deceased.³⁶ Nor is it necessary that any benefit should have been actually received from the deceased during his lifetime.³⁷ The benefit must be derivable, however, from the claimant's relationship to the deceased, and not merely from a contract between them. So in *Burgess v. Florence Nightingale Hospital for Gentlewomen*³⁸ the plaintiff and his wife had been professional dancing partners before her death had been caused by the negligence of a surgeon. The husband claimed damages for the loss of his wife as a dancing partner and also for the loss of her contribution to their joint living expenses. The claim under the first head failed, for there was no benefit arising out of the partnership that could properly be attributed to the relationship of husband and wife.³⁹ But the claim under the second head succeeded. For when a husband and wife, either with separate incomes or with a joint income to which they are both beneficially entitled, are living together and sharing their expenses, and in consequence their joint living expenses are less than the expenses of each one living separately, then each is thereby conferring a benefit on the other. But a merely speculative possibility of pecuniary benefit is not enough.⁴⁰ When the dependant himself dies subsequently to the death of the person in respect of whose death the action is brought but before judgment, the shortness of his tenure of life before dependence was terminated must be taken into account in determining the amount to be awarded.⁴¹

Funeral expenses may be recovered if they have been incurred by the parties for whose benefit the action is brought.⁴²

³⁵ *British Transport Commission v. Gourley* [1956] A.C. 185.

³⁶ *Sheils v. Cruickshank* [1953] 1 W.L.R. 533.

³⁷ *Taff Vale Ry. v. Jenkins* [1913] A.C. 1.

³⁸ [1955] 1 Q.B. 349.

³⁹ *Aliter* if the wife has been employed by the husband's one-man company: *Malton v. Plummer* [1964] 1 Q.B. 330.

⁴⁰ *Barnett v. Cohen* [1921] 2 K.B. 461.

⁴¹ *Williamson v. Thorneycroft & Co.* [1940] 2 K.B. 658.

⁴² Law Reform (Miscellaneous Provisions) Act, 1934, s. 2 (3).

(iii) Conversely any pecuniary benefit or reasonable expectation of pecuniary benefit to the relatives⁴³ from the death of the deceased must be taken into account in reduction of damages, which "are given to compensate the recipient on a balance of gains and losses for the injury sustained by the death."⁴⁴ Thus the benefits which a wife and children take under a settlement upon the death of the husband must be taken into account.⁴⁵ So where the relatives are also entitled either under a will or on intestacy to a share of the deceased's estate any damages given under the Law Reform (Miscellaneous Provisions) Act, 1934, will go in reduction of the amount awarded to them under the Fatal Accidents Acts. A deduction must also be made for the inheritance of other assets, unless (for example) these consist of articles of which a widow claimant would have had the use when her husband was alive and at home.⁴⁶ In such a case the capitalised value of the acceleration would be very small. Further, if the defendant can prove that the dependency originally lost has since been reduced or has ceased entirely, the damages may be reduced, as when the mother of a dependent child remarries, and the step-father accepts the child as one of his own family,⁴⁷ for in such a case there is in truth a substitute bread-winner.

But there are some important statutory exceptions to the general rule. Section 2 (1) of the Fatal Accidents Act, 1959, provides that in assessing damages in respect of a person's death in any action under the Fatal Accidents Acts, there shall not be taken into account any insurance money,⁴⁸ benefit,⁴⁹ pension⁵⁰ or gratuity which has been or will or may be paid as a result of

⁴³ See Ganz, "Mitigation of Damages by Benefits Received" (1962) 25 M.L.R. 559.

⁴⁴ Per Lord Porter in *Davies v. Powell Duffryn Collieries* [1942] A.C. at 623. But this may not be a rule for all cases: *Roughead v. Railway Executive* (1949) 65 T.L.R. 435.

⁴⁵ *Pym v. Great Northern Ry.* (1863) 4 B. & S. 396.

⁴⁶ *Bishop v. Cunard White Star, Ltd.* [1950] P. 240, 248; *Heatley v. Steel Co. of Wales, Ltd.* [1953] 1 W.L.R. 405.

⁴⁷ *Reincke v. Gray* [1964] 2 All E.R. 687.

⁴⁸ Words which, by s. 2 (2), include a return of premiums. The exclusion of money payable under an insurance policy was first enacted by the Fatal Accidents (Damages) Act, 1908, which is now repealed.

⁴⁹ This word means (by s. 2 (2)) benefit under the National Insurance Acts (yet in an action by a living plaintiff for personal injuries there is a deduction: see above, § 218) and also any payment by a friendly society or trade union for the relief or maintenance of a member's dependants.

⁵⁰ This is an important innovation, as under the old law pensions were deductible, even though paid voluntarily or under a contributory scheme. The word "pension" includes a return of contributions, and any payment

the death. The words "as a result of the death" may give rise to some difficult questions of causation.⁵¹ Before the Act the courts had held that sums subscribed by strangers from charitable motives were not "resulting from such death" (the phrase in section 2 of the 1846 Act⁵²), but that similar sums subscribed by the deceased's employers were a result of the death.⁵³ The present tendency is to interpret these words in a way generous to the dependants.⁵⁴

(iv) When all necessary deductions from the starting sum have been made, the resulting total should be apportioned amongst the family, taking the family as a unit, when claims are made in respect of more than one dependant,⁵⁵ although each dependant is entitled to an individual judgment for a separate sum.

The actual apportionment is no concern of the defendant. The court has power to control the investment and release of the damages when a widow or infants are dependants⁵⁶ although it has no such power in respect of Law Reform Act damages.

Carriage by air⁵⁷

In the case of international carriage⁵⁸ by air the right to proceed under the Fatal Accidents Acts is done away with, and the amount of damages where there is no special contract is limited to 250,000 gold francs for each passenger. This is provided by the Carriage by Air Act, 1961,⁵⁹ which makes the carrier liable for damage sustained in the event of the death of a passenger if the accident which caused the damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

of a lump sum. Yet a pension payable to a living plaintiff must be deducted: see above, § 218. It is hard to defend these anomalies.

⁵¹ See above, §§ 203-207.

⁵² *Peacock v. Amusement Equipment Co., Ltd.* [1954] 2 Q.B. 437

⁵³ *Jenner v. Allen West & Co., Ltd.* [1959] 1 W.L.R. 554.

⁵⁴ *Malyon v. Plummer* [1964] 1 Q.B. 330.

⁵⁵ *Bishop v. Cunard White Star, Ltd.* [1950] P. 240

⁵⁶ R.S.C., Ord. 80, r. 12.

⁵⁷ Winfield, *Torts*, pp. 139-140.

⁵⁸ As defined by the First Schedule, art. 1 (2) of the Carriage by Air Act, 1961.

⁵⁹ First Schedule, arts. 17, 22. A carrier guilty of wilful misconduct may not avail himself of these provisions: *Horabin v. B.O.A.C.* [1952] 2 All E.R. 1016.

REMEDIES : MISCELLANEOUS MATTERS

§ 222. Successive Actions on the Same Facts

More than one action will not lie on the same cause of action; therefore all damages resulting from the same cause of action must be recovered at one and the same time. The rule is designed to prevent the oppressive and vexatious litigation that might result if an injured person were at liberty to divide his claim and sue in successive actions for different portions of the loss sustained from a single cause of action. Thus in *Fitter v. Veal*¹ the plaintiff, after recovering damages for an assault and battery, discovered that his injuries were more serious than was at first supposed, and he found it necessary to submit to a surgical operation; whereupon he brought a second action for additional damage. But it was held that he had only one cause of action, which had been wholly extinguished by the judgment recovered in the first action. The application of this rule is not excluded or affected by the fact that when the first action was brought the damage in respect of which the second action is brought had not yet accrued to the plaintiff.² But if the damage was unknown to him he may be able to obtain an extension of time under the Limitation Act, 1963.³

If, however, there are two distinct causes of action, and not merely two distinct heads of damage, successive actions will lie in respect of each of them. This happens in the following classes of cases:

- (1) When the same act amounts to a violation of two distinct rights;
- (2) When the defendant has committed two distinct acts, even though in violation of the same right;
- (8) When the cause of action is a continuing one;

¹ (1701) 12 Mod. 542; (*sub tit. Fetter v. Beale*) 1 Ld. Raym. 399, 692, approved in *Cartledge v. E. Jopling & Sons, Ltd.* [1963] A.C. 758, 780.

² *Fitter v. Veal* (1701) 12 Mod. 542; *Read v. Great E. Ry.* (1868) L.R. 3 Q.B. 555; *Derrick v. Williams* [1989] 2 All E.R. 559.

³ See below, § 224.

- (4) (Probably) When the wrong is only actionable on proof of actual damage and it produces damage at different times.

(1) Violation of distinct rights

When the wrongful act of the defendant has violated two distinct rights vested in the plaintiff, a separate action will lie to recover the damage suffered in respect of each of these rights. Thus in *Brunsdon v. Humphrey*⁴ the plaintiff, a cabdriver, having already recovered compensation in the county court for damage done to his cab by a collision with the defendant's van, was held entitled by a majority of the Court of Appeal to bring a second action in the High Court in respect of personal injuries suffered by him in consequence of the same accident. So a plaintiff who has already sued for damages in a personal capacity can subsequently bring another action for damages arising from the same wrongful act in a representative character.⁵ To justify two actions, however, there must be two distinct rights violated; it is not enough that the same act amounts to two distinct violations of the same right. Thus separate actions will not lie for two different personal injuries received from the same act of negligence or assault, as when the plaintiff has his leg broken and also his arm.⁶

(2) Distinct wrongful acts

So also two actions will lie when the defendant has committed two distinct wrongful acts, even against the same person in violation of the same right. Thus if he has on two different occasions entered upon the plaintiff's land, the plaintiff is not bound to sue for both these trespasses at once, but may bring separate actions for each of them. On the same principle, if the same libellous statement is published to two or more persons at different times, a separate action will lie for each publication.⁷

⁴ (1884) 14 Q.B.D. 141. This case has always been regarded as of sound authority: *Derrick v. Williams* [1939] 2 All E.R. 559, 566.

⁵ *Marginson v. Blackburn B.C.* [1939] 2 K.B. 426; *Townsend v. Bishop* (1939) 160 L.T. 296; *Edwards v. Joyce* [1954] V.L.R. 216; *Randolph v. Tuck* [1962] 1 Q.B. 175. See Street, "Estoppel and the Law of Negligence" (1957) 73 L.Q.R. 358.

⁶ *Conquer v. Boot* [1928] 2 K.B. 336, 340.

⁷ Any vexatious or oppressive exercise of this right of suing separately for a number of acts of the same kind will be restrained by the court in the exercise of its discretionary power to prevent the abuse of legal process.

(3) Successive actions for continuing injuries

When the act of the defendant is a continuing injury, its continuance after the date of the first action is a new cause of action for which a second action can be brought, and so from time to time until the injury is discontinued. An injury is said to be a continuing one so long as it is still in the course of being committed and is not wholly past. Thus the wrong of false imprisonment continues so long as the plaintiff is kept in confinement; a nuisance continues so long as the state of things causing the nuisance is suffered by the defendant to remain upon his land; and a trespass continues so long as the defendant remains present upon the plaintiff's land. In the case of such continuing injury an action may be brought during its continuance, but damages are recoverable only down to the time of their assessment in the action.⁸ Prospective damages for any further continuance of the injury are not recoverable by way of anticipation, for *non constat* that the defendant will not discontinue the wrong forthwith. This is so however permanent the source of the mischief may be, and however improbable it may be that the defendant will discontinue it: as when he has built a house which blocks the ancient lights of the plaintiff. There will be time enough to sue for future damage when it accrues.⁹ Nor does it make any difference in this respect that the known probability of the future continuance of the injury has diminished the present saleable value of the property affected by it. The diminution of value caused by the fear of a future injury does not amount to present and accrued damage which may be now recovered.¹⁰

If the continuing injury is actionable *per se*, as in the case of trespass, or if it is the cause of fresh damage from day to day, as in the case of an obstruction of ancient lights, successive actions will lie *de die in diem* until the defendant chooses to relieve himself from this burden of litigation by discontinuing his wrong. If, on the other hand, a continuing injury is of a kind which is actionable only on proof of actual damage, and the damage caused is intermittent, as in the case of withdrawal of support, a new action will lie only when some new damage

⁸ Ord. 36B, r. 7.

⁹ *Darley Main Colliery Co. v. Mitchell* (1886) 11 App.Cas. 127.

¹⁰ *West Leigh Colliery Co. v. Tunnicliffe & Hampson, Ltd.* [1908] A.C. 27.

accrues. A continuing injury to property is actionable at the suit of a plaintiff whose title did not accrue until after the commencement of the injury, and such a plaintiff may recover damages in respect of the continuance of the act since the accrual of his title. Thus, he who buys land may sue for a continuing trespass or nuisance which existed at the time of his purchase.¹¹ Notwithstanding these rules as to the measure of damages in continuing injuries, when an action is brought for an injunction against such an injury, damages may be given in substitution for an injunction; such damages are given in full satisfaction for all future damage which may arise from a continuance of the injury complained of, and therefore no subsequent action will lie in respect thereof.¹²

(4) Successive actions for wrongs actionable only on proof of damage

Where the act of the defendant is actionable *per se*, there is no doubt that all damage, both actual and prospective, may and must be recovered in one action. But where the act of the defendant is not actionable *per se*, but is actionable only if it produces actual damage, and it produces damage twice at different times, is there one cause of action, or are there two? If, for example, the defendant by an act of negligence has created a source of danger which on two successive occasions causes personal harm to the plaintiff, is the plaintiff barred from recovery for the second harm because he has already recovered damages or accepted compensation for the first? Both on principle and on authority¹³ it seems that when an act is actionable only on proof of actual damage, successive actions will lie for each successive and distinct accrual of damage. But where the damage sued for in the second action is not in reality distinct from that sued for in the first, but is merely a part of it or consequential upon it, it cannot be recovered. For it is clear that the second damage in order to be recoverable in a second action must arise directly from the wrongful act of the defendant and not indirectly through the damage already sued for. In other

¹¹ *Konskier v. B. Goodman, Ltd.* [1928] 1 K.B. 421.

¹² See below, § 223.

¹³ *Darley Main Colliery Co. v. Mitchell* (1886) 11 App.Cas. 127. Distinguished in *Maberley v. Peabody & Co.* [1946] 2 All E.R. 192. Cf. *O'Keefe v. Walsh* [1903] 2 I.R. 681, 700 (conspiracy).

words, compensation for the first damage includes compensation for all the ulterior consequences of that damage whether already accrued or not, but it does not include compensation for entirely distinct damage accruing from the defendant's act independently of the damage first sued for.

Accord and satisfaction

An accord and satisfaction is a destruction of the cause of action, just as a judgment is, and therefore it is equally a bar to any later action founded on the same cause of action, even though for further damage.¹⁴ Yet if it can be shown that the real agreement between the parties was not to destroy the whole cause of action, but merely to pay and receive compensation for the damage accrued up to that time, that agreement will be effective, and an action will lie for any further damage.

§ 223. Injunctions

Under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 45, all Divisions of the High Court have power to issue injunctions whenever it shall appear to the court to be just and convenient that such order should be made. Injunctions are either prohibitory or mandatory. A prohibitory injunction is an order restraining the defendant from committing or repeating an injurious act—for example, a trespass to land or the erection of a building which would obstruct the plaintiff's lights. A mandatory injunction is an order requiring the defendant to do some positive act for the purpose of putting an end to a wrongful state of things created by him—for example, an order to pull down a building which he has already erected to the obstruction of the plaintiff's lights.¹⁵ Injunctions, whether prohibitory or mandatory, are either interlocutory or perpetual. An interlocutory (or interim) injunction is one issued provisionally before the hearing of an action, in order to prevent the commission or continuance of an alleged injury in the meantime, pending an inquiry into the case and a final determination of the right of the plaintiff to a perpetual injunction.

¹⁴ *Read v. Great Eastern Ry.* (1868) L.R. 3 Q.B. 555.

¹⁵ For an example, see *Kelsen v. Imperial Tobacco Co., Ltd.* [1957] 2 Q.B. 344, above, § 19.

The plaintiff must establish that some legally recognised right of his is threatened with infringement before he is entitled to an injunction.¹⁶ Injunctions are either against the continuance of an injury, against the repetition of one, or against the commission of one. The commonest and most important case is the first of these; and injunction is the ordinary and most effective remedy in all cases of continuing wrongs—for example, a nuisance or the infringement of a right of light. Even when the injury is not continuing, however, an injunction may be granted if there is any sufficient reason to believe that it will be repeated—for example, a trespass under a claim to a right of way. Indeed, it is possible to say that every tort is redressible by an injunction except assault and battery, false imprisonment, and malicious prosecution.¹⁷ An interlocutory injunction to restrain the publication of defamatory matter will be granted only in the clearest cases, in which any jury would say the matter was defamatory, and in which, if the jury did not so find, their verdict would be set aside on appeal as unreasonable.¹⁸ Again, even if no complete injury or cause of action for damages yet exists, an injunction may be obtained in a *quia timet* action to prevent the commission of an injury in the future; as when the defendant threatens or intends to erect a building which will obstruct the plaintiff's lights. In all cases, however, it seems necessary that there shall be a sufficient degree of probability that the injury will be substantial and will be continued, repeated, or committed at no remote period.¹⁹

No injunction will be granted in a case where obedience to such an order is impossible.²⁰ For there are cases in which a defendant is liable in law for the continuance of a wrongful state of things, and yet has no power to put an end to it. In such a case, unless the court grants an injunction but suspends its operation for such time as may seem necessary to enable the defendant to comply with the order,²¹ the plaintiff's only

¹⁶ *Day v. Brownrigg* (1878) 10 Ch.D. 294; *Victoria Park Racing and Recreation Grounds Co., Ltd. v. Taylor* (1937) 58 C.L.R. 479.

¹⁷ *Winfield, Tort*, p. 103.

¹⁸ *Bonnard v. Perryman* [1891] 2 Ch. 269; *Sinclair v. Gogarty* [1937] I.R. 377.

¹⁹ *Att.-Gen. v. Nottingham Corporation* [1904] 1 Ch. 673.

²⁰ *Harrington (Earl) v. Derby Corporation* [1905] 1 Ch. 205, 220.

²¹ A well established practice in the case of injunctions against local authorities: *Pride of Derby and Derbyshire Angling Association, Ltd. v. British Celanese, Ltd.* [1953] Ch. 149.

remedy is damages. Nor will an injunction be granted to restrain a trespass to person or property if its effect would be directly to maintain the party seeking it in an illegal position.²²

Damages in lieu of injunction

Since Lord Cairns' Act, 1858,²³ the court has had jurisdiction, in all cases in which it might grant an injunction, to award damages either in addition to or in substitution for such an injunction. The jurisdiction created by Lord Cairns' Act seems to be at once wider and narrower than that of the High Court under the Judicature Act. It is wider in that damages can be given when they have not been asked for; narrower, in that they can only be given in a case where an injunction could be given. The discretion of the court to depart from the general rule of restraining an injury by injunction, and to compel a plaintiff to accept pecuniary satisfaction for his wrongs, is unfettered. But in the leading case of *Shelfer v. City of London Electric Lighting Co.*,²⁴ Lindley L.J. said: "Ever since Lord Cairns' Act, the Court of Chancery has repudiated the notion that the legislature intended to turn that court into a tribunal for legalising wrongful acts; or, in other words, the court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. . . . Such jurisdiction ought not to be exercised except under very exceptional circumstances." The necessity of this power of refusing an injunction in special cases is due to the fact that the remedy of injunction, if granted in all cases as a matter of right, could be used by plaintiffs as an instrument of unjust oppression, with the most mischievous results both to individual litigants and to the public. It is notorious, for example, that the facility with which injunctions have in the past been granted to prevent the obstruction of ancient lights has led to the rise of a class of plaintiffs whose sole object is extortion. Since the refusal of an injunction is a matter of judicial discretion, no hard-and-fast rules can be laid down on the point. But, "In my opinion,"

²² *Boreham v. Commonwealth of Australia* (1959) 88 C.L.R. 518.

²³ Although the Act has been repealed the jurisdiction so created is preserved by s. 97 of the Supreme Court of Judicature (Consolidation) Act, 1925.

²⁴ [1895] 1 Ch. 287, 315, 316.

said A. L. Smith L.J. in *Shelfer's* case,²⁵ "it may be stated as a good working rule that (i) if the injury to the plaintiff's legal rights is small, (ii) and is one which is capable of being estimated in money, (iii) and is one which can be adequately compensated by a small money payment, (iv) and the case is one in which it would be oppressive to the defendant to grant an injunction: then damages in substitution for an injunction may be given." It has been held by the Judicial Committee that the onus of proving special circumstances which would justify the award of damages is on the defendant.²⁶ We may say that at least three matters may be taken into account by the court, namely, (1) the magnitude of the injury complained of, (2) the conduct of the parties, and (3) the interests of the defendant and the public.

(1) *Injury too trifling*

On this principle injunctions have been refused in the case of merely temporary or intermittent nuisances,²⁷ and in the case of repeated trespasses committed under a claim of right but causing no damage,²⁸ and in cases where the interest of the plaintiff in the property affected was about to determine.²⁹

(2) *Conduct of the parties*

If a plaintiff has knowingly stood by and made no objection while the defendant has in ignorance invaded his rights (as by erecting a building which obstructs an easement of light or a right of way), no injunction will be granted to him.³⁰ Conversely, if the defendant has himself acted with wilful and high-handed disregard of the plaintiff's rights, an injunction will be granted even in cases which would otherwise have been deemed unsuitable for this remedy.³¹

²⁵ [1895] 1 Ch. 287, at 322. In *Maberley v. Peabody & Co.* [1946] 2 All E.R. 192, at 195, Stabile J. called this a "short, clear and authoritative statement of the law"; but see the warning of the C.A. in *Fishenden v. Higges and Hill* (1935) 153 L.T. 128.

²⁶ *McKinnon Industries, Ltd. v. Waller* [1951] 3 D.L.R. 577, 581, per Lord Simonds; *Maker v. Davanne Holdings* [1955] 1 D.L.R. 728.

²⁷ *Swaine v. Gt. N. Ry.* (1864) 4 De G.J. & S. 211.

²⁸ *Behrens v. Richards* [1905] 2 Ch. 614.

²⁹ *Jacomb v. Knight* (1863) 3 De G.J. & S. 533.

³⁰ *Gaskin v. Balls* (1879) 13 Ch.D. 324.

³¹ *Sefton (Earl) v. Tophams, Ltd.* [1964] 3 All E.R. 876.

(8) *Effect of injunction on interests of defendant or of the public*

When, on the other hand, the damage done or apprehended is substantial, and there is nothing in the conduct of the plaintiff sufficient to render him undeserving of this remedy, an injunction will be granted even though its effect will be to inflict upon the defendant or upon the public at large a loss that is much greater than any benefit so conferred upon the plaintiff. The court will not sanction, in the interest of individuals or of the public, any substantial invasion of private rights, even on the terms of paying full compensation for the injury so inflicted.³² So Lord Sumner, dissenting, doubted³³ "whether it is complete justice to allow the big man, with his big building and his enhanced rateable value and his improvement of the neighbourhood, to have his way, and to solace the little man for his darkened and stuffy little house by giving him a cheque that he does not ask for."

When damages are awarded in substitution for an injunction in pursuance of the discretionary jurisdiction conferred by Lord Cairns' Act, such damages are given in respect of the future, and not merely, as at common law, in respect of damage already done in the past. Such an award of damages amounts, therefore, to a legalisation of the apprehended mischief; the defendant has thereby purchased a right to do the act in respect of which an injunction was asked, and in respect of which damages have been given instead. Further, it should be noted that a bare majority of the House of Lords has held³⁴ that the court has power to award damages in lieu of an injunction in a *quia timet* action when no actual harm or complete cause of action for damages already exists. The curious result of this decision is that a court of equity has power to award damages when a court of law could not.

§ 224. The Limitation of Actions

The Limitation Act, 1939, as amended by the Law Reform (Limitation of Actions, etc.) Act, 1954, has greatly simplified

³² *Shelfer's Case* [1895] 1 Ch. 287, 316. See also *Bellew v. Cement, Ltd.* [1948] I.R. 62; *Pride of Derby and Derbyshire Angling Association, Ltd. v. British Celanese, Ltd.* [1953] Ch. 149, 181-182, 192, 194.

³³ *Leeds Industrial Co-operative Society v. Slack* [1924] A.C. 851, at 872.

³⁴ *Leeds Industrial Co-operative Society v. Slack* [1924] A.C. 851.

the law relating to the limitation of actions for tort.³⁵ By the Act of 1939³⁶ no action founded on tort shall be brought after the expiration of six years from the date on which the cause of action accrued. By the Act of 1954 the limitation period for actions for damages in respect of personal injuries has been reduced to three years. There are a few other exceptional cases for which a shorter period of limitation has been prescribed. We shall deal with them later.

When time begins to run

The period of limitation begins to run at the time when the cause of action accrued, i.e., "the earliest time at which an action could be brought."³⁷

Therefore, when a wrongful act is actionable *per se* without proof of actual damage, the statute runs from the time at which the act was committed—as in libel,³⁸ assault, or trespass to land or goods. This is so even though the resulting damage does not happen or is not discovered until a later date; for such damage is not a new cause of action, but merely an incident of the old one.³⁹

When, on the other hand, the wrong is not actionable without actual damage the period of limitation does not begin to run until that damage happens: as in the case of negligence,⁴⁰ fraud, or wrongful interference with an easement of support.⁴¹ It was formerly held that once damage had occurred the cause of action accrued⁴² and time began to run against the plaintiff even though he was unaware or mistaken as to the consequences of the

³⁵ See the Fifth Interim Report of the Law Revision Committee (Cmd. 5334); Report of Lord Justice Tucker's Committee on the Limitation of Actions, 1949 (Cmd. 7740); Preston and Newsom, *Limitation of Actions*, 3rd ed.; Franks, *Limitation of Actions*.

³⁶ s. 2 (1) (a). The Act must be pleaded; the court will not of its own motion take notice that the action is out of time: *Dismore v. Milton* [1938] 3 All E.R. 762.

³⁷ *Reeves v. Butcher* [1891] 2 Q.B. 509, 511, *per* Lindley L.J. But the day on which the accident happens is excluded: *Marren v. Dawson Bentley & Co., Ltd.* [1961] 2 Q.B. 135.

³⁸ *Brunswick (Duke of) v. Harmer* (1849) 14 Q.B. 185. See above, § 59.

³⁹ *Cartledge v. E. Jopling & Sons, Ltd.* [1963] A.C. 758.

⁴⁰ *Watson v. Winget, Ltd.*, 1960 S.C. 92.

⁴¹ *Backhouse v. Bonomi* (1861) 9 H.L.C. 503. As to the period of limitation when distinct damage results at different times from the same wrongful act, see above, § 222.

⁴² Is it certain in all cases that damage and negligence are simultaneous? Chapman, *Statutes*, p. 442-443.

damage,⁴³ or even though the defendant is unknown or untraceable.⁴⁴ This gave rise to grave injustice in some cases of pneumoconiosis, in which substantial injury to the lungs may be suffered years before it can be discovered. A committee reported⁴⁵ in favour of a change in the law, and the Limitation Act, 1968,⁴⁶ now provides for the extension of time by the leave of the court. Section 1, subsections 3 and 4, provide as follows :

(3) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that the material facts relating to that cause of action⁴⁷ were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—

- (a) either was after the end of the three-year period relating to that cause of action or was not earlier than twelve months before the end of that period, and
 - (b) in either case, was a date not earlier than twelve months before the date on which the action was brought.
- (4) Nothing in this section shall be construed as excluding or otherwise affecting—
- (a) any defence which in any action to which this section applies may be available by virtue of any enactment other than section 2 (1) of the Limitation Act, 1939 (whether it is an enactment imposing a period of limitation or not) or by virtue of any rule of law or equity, or
 - (b) the operation of any enactment or rule of law or equity which apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

Section 3 provides that the Act applies to actions brought after the death of the injured person.

When the injury is a continuing one—for example, a nuisance—a new cause of action arises *de die in diem* or as often as fresh damage accrues; and therefore an action will always lie in respect of any continuance of the wrong, or any accrual of fresh damage,

⁴³ *Cartledge v. E. Jopling & Sons, Ltd.* [1963] A.C. 758.

⁴⁴ *R. B. Policies at Lloyd's v. Butler* [1950] 1 K.B. 76.

⁴⁵ (1961), Cmd. 1829.

⁴⁶ Which received the royal assent on July 31, 1963, only six months after the decision in *Cartledge v. Jopling*. Law reform can be speedy.

⁴⁷ See *Re Clark v. Forbes Stuart, Ltd.* [1964] 2 All E.R. 282.

which is not more than six years old. Thus, when a continuing nuisance has lasted for ten years, an action will lie for damages for its continuance during the last six years, although any claim for damages for the first four years is barred by the statute.⁴⁸

No defendant

Even when a cause of action is otherwise complete, it may be that there is not yet in existence any person who is capable of instituting the action, or any defendant capable of being sued; and in such case time does not begin to run until this bar to the institution of an action has disappeared. Thus if a tort is committed against the estate of an intestate in the interval between his death and the grant of letters of administration the statute does not begin to run until an administrator is appointed.⁴⁹ If, however, a complete and available cause of action has once come into existence, no subsequent and temporary bar to the institution of an action—for example, the death of either party intestate—has any effect in suspending the running of the statute.⁵⁰

Disability

If when a cause of action accrued the person to whom it accrued was under a disability, the action may be brought within six years from the date when he ceased to be under a disability or died, whichever event first occurred.⁵¹ But in the case of an action for personal injuries⁵² the period is three years, and the plaintiff must prove that the person under the disability was not, at the time when the right of action accrued to him, in the custody of a parent.⁵³ A person is deemed to be under a disability while he is an infant⁵⁴ or of unsound mind.⁵⁵ A person is conclusively presumed to be of unsound mind if he is detained under any Act authorising the detention of persons of unsound mind or mental deficients.⁵⁶ These disabilities must exist at the

⁴⁸ *Harrington (Earl of) v. Darby Corporation* [1905] 1 Ch. 205, 227.

⁴⁹ *Murray v. East India Co.* (1821) 4 B. & Ald. 204.

⁵⁰ *Rhodes v. Smethurst* (1840) 6 M. & W. 351.

⁵¹ Limitation Act, 1939, s. 22. See Chapman, *Statutes*, p. 436.

⁵² Below, § 225.

⁵³ Law Reform (Limitation of Actions, etc.) Act, 1954, s. 2 (2).

⁵⁴ A person attains the age of twenty-one at the first moment of the day preceding the twenty-first anniversary of his birth.

⁵⁵ Limitation Act, 1939, s. 31 (2).

⁵⁶ *Ibid.* s. 31 (3).

time when the cause of action first arises. If the statute has once commenced to run, the subsequent insanity of the plaintiff or the fact that the claim has passed to a person under a disability⁵⁷ will not have any effect.⁵⁸ When a person is under successive disabilities, *e.g.*, insanity supervening on infancy, time does not run against him until the last of the disabilities has come to an end provided that there is no interval between any of the disabilities.⁵⁹ But, when a right of action which has accrued to a person under a disability accrues on his death to another person under a disability, no further extension of time is allowed.⁶⁰

Fraud

When the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or the right of action is concealed by the fraud of any such person, or the action is for relief from the consequences of a mistake, time does not run until the plaintiff has discovered the fraud or the mistake, or could with reasonable diligence have discovered it. But the bona fide purchaser of property for valuable consideration is not to be prejudiced by this provision.⁶¹

In the expression "the rule of concealed fraud," as it used to be called, *fraud* is used in its widest sense as meaning any act of wilful and conscious furtive wrongdoing—for example, a wilful underground trespass and abstraction of minerals—or even any unconscionable dealing between parties who stand in a special relationship to each other.⁶² The term *concealed*, moreover, does not imply any active suppression of the facts by the defendant, but means merely that the fraud is unknown to the person injured at the time of its commission.⁶³

§ 225. Special Periods of Limitation

The general limitation of six years established by the Limitation Act, 1939, is cut down in four special cases: (1) personal

⁵⁷ *Ibid.* s. 22 (a).

⁵⁸ *Rhodes v. Smethurst* (1840) 6 M. & W. 351.

⁵⁹ *Borrows v. Ellison* (1871) L.R. 6 Ex. 128.

⁶⁰ Limitation Act, 1939, s. 22 (b).

⁶¹ Limitation Act, 1939, s. 26.

⁶² *Kitchen v. R.A.F. Association* [1958] 1 W.L.R. 563.

⁶³ *Beaman v. A. R. T. S. Ltd.* [1949] 1 K.B. 550.

injuries; (2) accidents at sea and in the air; (3) actions arising out of death; (4) contribution between tortfeasors.

(1) Personal Injuries

Section 2 (1) of the Law Reform (Limitation of Actions, etc.) Act, 1954, amends the Limitation Act, 1939, by reducing from six years to three years the period of limitation for actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision), where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person. The Court of Appeal has held ⁶⁴ that the words "breach of duty" are wide enough to include causes of action for personal injuries which are framed in trespass as distinct from case. This is to be welcomed on the ground that it is undesirable that a plaintiff should be able to avoid the three-year period of limitation by taking advantage of the technicalities of the forms of action. Still, on the other side it may be said that the distinction between trespass and case has not yet been formally abolished,⁶⁵ that the Limitation Acts have not impliedly done so, and that a plaintiff is entitled to the period of limitation appropriate to his cause of action until Parliament otherwise determines.

The moment of time from which time begins to run against the plaintiff is the moment at which the cause of action accrues. If the cause of action is negligence,⁶⁶ this moment will be that at which the plaintiff suffers more than minimal damage by reason of the defendant's breach of duty.⁶⁷ The words "personal injury" include any disease and any impairment of a person's physical or mental condition. The reason for this change is that it is desirable in the interests of justice that actions for personal injuries should be brought to trial quickly, while the evidence is still fresh in the minds of parties and witnesses.

⁶⁴ *Letang v. Cooper* [1965] 1 Q.B. 232.

⁶⁵ See above, § 1.

⁶⁶ For other causes of action, see above, § 224.

⁶⁷ *Watson v. Winget, Ltd.*, 1960 S.C. 92.

(2) Accidents at sea and in the air

By the Maritime Conventions Act, 1911, a period of limitation of two years is imposed upon claims in respect of damage to a vessel or her cargo, or in respect of loss of life or personal injuries suffered by any person on board a vessel, caused by the fault of any other vessel.⁶⁸ Under the same Act the period within which the owners of the vessels involved may enforce their right of contribution in cases of loss of life or personal injuries is one year from the date of payment. These periods may, however, be extended by the court in certain circumstances.⁶⁹ By the Carriage by Air Act, 1961, a two-year limitation period applies to such proceedings against air-carriers as are governed by that Act.⁷⁰

(3) Statutes connected with death

Section 3 of the Act of 1954 has extended from twelve months to three years the period within which actions under the Fatal Accidents Act, 1846, must be commenced.⁷¹ We have already seen that since the Act of 1954 it is no longer necessary for the plaintiff in proceedings against the estate of a deceased wrongdoer under the Law Reform (Miscellaneous Provisions) Act, 1934, to show that the cause of action arose not more than six months before his death. The law now is that proceedings (unless already pending at the death of the deceased) must be begun within six months after representation to his estate has been taken out and in any event within the appropriate period provided by the Acts of 1939 and 1954.

(4) Contribution between tortfeasors

The limitation period is two years under the Limitation Act, 1963, section 4 (see above, p. 687).

§ 226. Felonious Torts

When a tort is also a felony, no action can be brought in respect of the tort until the defendant has been prosecuted for the

⁶⁸ Maritime Conventions Act, 1911, s. 8. The law is the same for all the Queen's ships: Crown Proceedings Act, 1947, s. 30, as amended by the Law Reform (Limitation of Actions, etc.) Act, 1954, s. 5 (2).

⁶⁹ See Cmd. 5334, s. 29.

⁷⁰ s. 5 (1).

⁷¹ See above, § 221.

felony or a reasonable excuse has been shown for his not having been prosecuted.⁷² The prosecution of the defendant must have been concluded before the plaintiff can bring his action; it is not enough for the prosecution to have been instituted but not concluded,⁷³ unless the plaintiff shows reasonable cause for the defendant not having been prosecuted to conviction or acquitted. The rule is designed in the interests of public justice, for it compels persons injured by felonies to fulfil their duty of prosecuting the offender, instead of contenting themselves with the enforcement of their private rights. It seems an anachronism now that the police prosecute or are assumed to prosecute in nearly every case of suspected felony.⁷⁴ If the defendant wishes to raise the objection that the wrong complained of amounts to a felony, the proper procedure is not to raise this as a defence in the pleadings, but to make an application to the court to stay the action.⁷⁵ The court "should only act in a clear case where public justice manifestly requires the plaintiff to prosecute or bring the matter before the public prosecutor,"⁷⁶ and the statement of claim discloses clearly that the action is one founded on felony.⁷⁷ The rule applies only to felonies, not to mere misdemeanours or criminal offences punishable only on summary conviction.⁷⁸

Exceptions

(1) The person sued for the tort must be the felon himself. If he is a third person innocent of any felony, although civilly responsible for the tort, an action will lie against him, whether the felon has been prosecuted or not. Thus an action will lie against a master in respect of a felonious tort committed by his

⁷² *Smith v. Selwyn* [1914] 3 K.B. 98; *Rose v. Ford* [1937] A.C. 826, 846-847. For the history of the rule see Holdsworth, H.E.L., iii, pp. 333-335.

⁷³ *Wonder Heat Pty., Ltd. v. Bishop* [1960] V.R. 489.

⁷⁴ And some misdemeanours (to which the rule does not apply) may be more serious than felonies. See the criticisms of Sir James Campbell L.C. in *Tyler v. Cork Co. Council* [1921] 2 I.R. 8, 18-20. But its retention is defended in *Henry Haskin & Co. (Pty.) v. Hooke* [1954] V.L.R. 300.

⁷⁵ *Smith v. Selwyn* [1914] 3 K.B. 98, 106. But since the rule is founded on public policy, it would seem that, once it appears that the cause of action is founded on a felony, the judge himself should stay the action and not allow the trial to proceed.

⁷⁶ *Carlisle v. Orr* [1917] 2 I.R. 534 at 538, per Gibson J.

⁷⁷ *Jack Clark (Rainham) Ltd. v. Clark* [1946] 2 All E.R. 683, 685.

⁷⁸ *Smith v. Selwyn* [1914] 3 K.B. 98.

servant in the course of his employment.⁷⁹ So the innocent receiver of stolen goods may be sued in trover although the thief has not been prosecuted.⁸⁰ (2) The rule does not apply to actions brought under the Fatal Accidents Acts, 1846 to 1959, even though the killing of the deceased amounted to murder or manslaughter. This Act expressly provides that the action will lie although the death shall have been caused under such circumstances as amount in law to felony.⁸¹ (3) The rule has no application unless the plaintiff in the action of tort is the person who was injured by the felony, and whose duty it therefore is to institute a prosecution. Thus, if the person injured becomes bankrupt, his right of action may pass to his trustee, but it is not accompanied by the duty of prosecuting, and therefore the trustee's right of action is not suspended.⁸² (4) Nor does the rule apply if the prosecution of the offender has become impossible notwithstanding due diligence on the part of the person whose duty it was to prosecute—as, for example, when the offender has died or escaped from the jurisdiction before there has been any undue delay in commencing a prosecution,⁸³ or, presumably, if there is any other reasonable justification of the failure to prosecute,⁸⁴ such as the fact that the conduct of the prosecution is in the hands of the Crown and that it is therefore due to no fault of the plaintiff that the trial has not yet taken place.⁸⁵

§ 227. Assignment of Rights of Action for Torts

The assignment of a right of action for damages for a tort is in general illegal and void.⁸⁶ The rule is based on considerations of public policy, and is designed to prevent the oppressive litigation that would result if a right of action for damages were recognised as a marketable commodity capable of purchase by way of a commercial speculation. The purchase of a right of

⁷⁹ *Osborn v. Gillett* (1879) L.R. 8 Ex. 88.

⁸⁰ *White v. Spettigue* (1845) 13 M. & W. 603.

⁸¹ s. 1.

⁸² *Ex p. Ball* (1879) 10 Ch.D. 667.

⁸³ *Ex p. Ball* (1879) 10 Ch.D. 667.

⁸⁴ *Smith v. Selwyn* [1914] 3 K.B. 98; *Carlisle v. Orr* (No. 2) [1918] 2 I.R. 442.

⁸⁵ *Wonder Heat Pty., Ltd. v. Bishop* [1960] V.R. 489.

⁸⁶ *Glegg v. Bromley* [1912] 3 K.B. 474. See on the whole of this section Winfield, *Present Law*, pp. 67–69.

action for a tort is, indeed, merely a particular form of the offence of maintenance—the act of assisting and promoting without lawful justification the litigation of others. The rule applies to torts of all kinds, whether they are injuries to property or to the person or otherwise, and the suggestion which has sometimes been made that injuries to property are an exception seems unsound.⁸⁷

This rule is not applicable in the following six cases:

(1) Where the right assigned has some other source than an illegal act. It is on this principle that rights arising under a contract are assignable, as opposed to rights arising from the breach of a contract. So also with rights arising *quasi ex contractu*, as in the case of money paid by mistake. On the same principle, there should be no objection to the assignment of a judgment debt even in an action of tort, or to the assignment of money agreed to be paid by way of settlement of a claim in tort. (2) The rule does not prevent the assignment of property merely because it is the subject of litigation and cannot be recovered without an action. Thus, a sale of chattels by A to B while they are wrongfully detained by C is valid and confers upon B a right of action against C.⁸⁸ (3) Where a trustee in bankruptcy assigns the bankrupt's choses in action, even though they arise *ex delicto*. For the trustee has a statutory power and a duty of realising the assets, and therefore of selling them if he pleases.⁸⁹ (4) The rule does not prevent the subrogation of an insurer to the rights of the assured, even though these rights are rights of action for damages for a tort, nor the subsequent express assignment of the assured's rights to the insurer. In such a case equity before the Judicature Act would have compelled the assignor to exercise his rights against the contract-breaker or tortfeasor for the benefit of the assignee. Since 1873 those rights can be the subject of an express assignment, provided that section 136 of the Law of Property Act, 1925, is complied with.⁹⁰ (5) Presumably the rule does not apply to any other case in which the assignee has any lawful interest in the subject-matter sufficient to exclude the doctrine of

⁸⁷ See *Dawson v. Gl. N. Ry.* [1905] 1 K.B. 260.

⁸⁸ *Dawson v. Gl. N. Ry.* [1905] 1 K.B. 260, 271.

⁸⁹ *Guy v. Churchill* (1888) 40 Ch.D. 481.

⁹⁰ *Compania Colombiana de Seguros v. Pacific S.N. Co.* [1964] 1 All E.R. 216.

maintenance—for example, an assignment by a trustee to his beneficiaries of a right of action for an injury to the trust estate.⁹¹ (6) The rule does not prevent the assignment of the fruits of an action in tort, *i.e.*, an assignment of the damages to be recovered in such an action—even though the assignment is made before the action has commenced or before judgment has been recovered.⁹² This is not the assignment of an existing cause of action. It is merely the equitable assignment of future property defined or identified by reference to such a cause of action. It confers upon the assignee no right to institute or intervene in the action, and is therefore free from that element of maintenance on which the general rule as to the non-assignability of rights of action is based.

§ 228. The Waiver of Torts ⁹³

There are certain cases in which a person injured by a tort is entitled, if he pleases, to waive the tort, as it is termed, and to sue instead in quasi-contract. In the days when forms of action still existed he had his election either to sue in trespass, trover, case, or some other delictual action, or to use instead the remedy appropriate to the breach of a simple contract—namely, *assumpsit*. In the days of strict pleading there were procedural advantages in selecting the form of *assumpsit*. Even today the process of waiving a tort has not ceased to be of practical importance.⁹⁴ The waiver of a tort is not allowed in all cases; it is a special device for special occasions. There is no general rule that he who is injured by a tort can sue on an implied contract to pay compensation for the harm so done. In what cases, then, is a waiver permitted? As the authorities stand, this question is not one which it is possible to answer completely. In certain cases when the defendant has by means of a tort become possessed of a sum of money at the expense of the plaintiff, the plaintiff may at his election sue either for damages for the tort, or in quasi-contract for money had and received by the defendant to the use of the

⁹¹ *Guy v. Churchill* (1888) 40 Ch.D. 481.

⁹² *Glegg v. Bromley* [1912] 3 K.B. 474.

⁹³ See Winfield, *Province*, pp. 168–176; Jackson, *Quasi-Contract*, pp. 61–84; Lord Wright, “*United Australia, Ltd. v. Barclays Bank, Ltd.*” (1941) 57 L.Q.R. 192, and his comments on the *Restatement in Legal Essays*, 53–54; Denning, (1949) 1 J.S.P.T.L. 258, 265–266; Fridman, “Waiver of Tort” (1955) 18 M.L.R. 1; Prosser, *Topics*, Chap. 7.

⁹⁴ *United Australia, Ltd. v. Barclays Bank* [1939] 2 K.B. 53, 56–57.

plaintiff. This is so, for example, if the defendant wrongfully takes by trespass or obtains by fraud the money of the plaintiff.⁹⁵ So also if the plaintiff's goods are wrongfully converted and sold by the defendant the plaintiff may choose between an action of trover for the value of the goods and an action in quasi-contract for the price so received by the defendant.⁹⁶ It is obvious that in these cases there is no real waiver as where the forfeiture of a lease is waived by the receipt of rent. By "waiving the tort" a plaintiff does not elect to be treated from that time forward on the basis that no tort has been committed; indeed, if no tort has been committed how can an action of assumpsit lie? It lies only because the acquisition of the defendant is wrongful and there is thus an obligation to make restitution. "If I find that a thief has stolen my securities and is in possession of the proceeds," said Lord Atkin,⁹⁷ "when I sue him for them I am not excusing him; indeed, he may be in prison upon my prosecution." The waiver is as fictitious as the contract. The phrase "waive the tort" is a picturesque one and has a pleasing sound and was (perhaps for that reason) regarded by the old common lawyers with affection,⁹⁸ but it is inaccurate. What is waived is not the tort but the right to recover damages for it. It is clear that there are torts to which the doctrine of waiver cannot be applied, for example, defamation and assault,⁹⁹ but it is not clear how far this doctrine does extend. There are authorities which, if they could be relied on, would justify us in laying down a general rule to the effect that whenever the defendant has by his tort acquired a profit of any sort (whether it is the receipt of money or not) the tort may be waived, and an action of restitution brought to compel payment of a pecuniary equivalent for that profit.¹ The torts which it has been held can be waived are those of conversion, trespass to land or goods, deceit and the action for extorting money by threats.

⁹⁵ *Neat v. Harding* (1851) 6 Ex. 349.

⁹⁶ *Rodgers v. Maw* (1846) 15 M. & W. 444, 448.

⁹⁷ [1941] A.C. at 29.

⁹⁸ One of them was sufficiently moved to express his feelings in verse:

"Thoughts much too deep for tears subdue the Court

When I *assumpsit* bring, and god-like waive a tort."

—J. L. Adolphus, "The Circuiteers: an Eclogue": 1 L.Q.R. 232.

⁹⁹ *United Australia Case* [1941] A.C. 1, 12.

¹ See *Lightly v. Clouston* (1808) 1 Taunt. 112 (seduction).

Effect of election

In those cases in which the waiver of a tort is permitted the two causes of action—delictual and quasi-contractual—are not cumulative but alternative. The plaintiff must make his election between them. Anything, therefore, which exhausts or extinguishes one of the causes of action destroys the other also. Thus judgment recovered in an action of tort submerges and destroys as against the same defendant not merely the cause of action in tort but also the cause of action in contract; and conversely a judgment in contract is a bar to any subsequent action based on the tort. Accordingly, when the plaintiff's goods have been converted and sold and he obtains judgment in an action for money had and received he cannot thereafter resort to an action of trover; and this is so even though the damages recoverable in trover would far exceed the price for which the defendant sold the goods and for which judgment has been obtained against him.² The same result follows if one of the causes of action is destroyed, not by merger in a judgment but by accord and satisfaction or any other form of release. The settlement of a claim or action for money had and received will effectively destroy any right to proceed subsequently for damages in tort; and this is so regardless of the relative values of the two claims.³ But the mere commencement of an action in quasi-contract is no bar to a subsequent action in tort: such an action is not a waiver of the tort but merely a choice of one of two alternative remedies, and it is judgment alone in the first action which constitutes a bar to the second.⁴

When election to be made

Confusion has arisen from failure to distinguish between (1) election between inconsistent rights, and (2) election between alternative remedies. If a man is entitled to one of two inconsistent rights, when with full knowledge⁵ he has done an unequivocal act showing that he has chosen the one, he cannot

² *Rice v. Reed* [1900] 1 Q.B. 54; *Re Simms* [1934] 1 Ch. 1.

³ In all such cases, however, it is a question of fact, depending upon the intention of the parties, whether the payment made by the defendant to the plaintiff was in truth an accord and satisfaction extinguishing the cause of action, rather than a mere payment on account in reduction of damages.

⁴ *United Australia, Ltd. v. Barclays Bank, Ltd.* [1941] A.C. 1. And if there are two tortfeasors an unsatisfied judgment against one is no bar to proceedings against the other.

⁵ [1941] A.C. 1, 30.

afterwards pursue the other,⁶ which after the first choice is by reason of the inconsistency no longer his to choose. The commencement of an action is only evidence from which an election may be inferred: it is not conclusive.⁷ Otherwise a plaintiff who issued a writ against one of two tortfeasors in order to prevent time running out would find that he was barred from proceeding against the other. When the plaintiff's failure to elect becomes embarrassing to the defendant and the court he may be compelled to make his election during the trial.⁸ But where there are alternative remedies on the same set of facts the plaintiff need not make his election until he applies for judgment.⁹ It need hardly be added that if the same act constitutes two different torts the bringing of an action for both of them is no waiver of either.¹⁰

Two wrongdoers

The question remains: how far does the plaintiff's election to sue A in quasi-contract stand in the way of his subsequently bringing an action on the same facts against B for conversion? The answer was given in *United Australia, Ltd. v. Barclays Bank*.¹¹ In that case the plaintiffs made out a cheque which was wrongfully endorsed by their secretary to the M. F. G. Co. The defendants collected it on behalf of that company. The plaintiffs brought an action against M. F. G. for money had and received, but before they had obtained judgment the company went into liquidation. The plaintiffs put in a proof in the winding up, but the company had no assets and the liquidator neither admitted nor rejected the proof. They then sued the defendants for conversion of the cheque. It was pleaded that by their action against M. F. G. and by their proof in the winding up they had waived their right to sue for the tort. But the House of Lords (reversing the Court of Appeal¹²) held that this was not so. The

⁶ *Re United Railways of the Havana and Regla Warehouses, Ltd.* [1961] A.C. 1007, 1065.

⁷ *Clarkson Booker, Ltd. v. Andjel* [1964] 2 Q.B. 775.

⁸ *British Ry. Traffic Co. v. Roper* (1939) 162 L.T. 217.

⁹ [1941] A.C. at 19, 30. Lord Porter (at 49) left the question open.

¹⁰ *Cazton Publishing Co. v. Sutherland Publishing Co.* [1939] A.C. 178, 199; *United Australia Case* [1941] A.C. 1, 18-19.

¹¹ [1941] A.C. 1.

¹² [1939] 2 K.B. 53. The C.A. thought their decision in accord with "general principles of right," but the H.L. was of opinion (rightly, it may be said) that they had prevented substantial injustice.

company and the bankers were not joint tortfeasors, though their independent acts had caused the same damage. Only satisfaction in the earlier proceedings would act as a bar to the second action. It was stressed that the bank and M. F. G. were not joint tortfeasors, but since the Law Reform (Married Women and Tortfeasors) Act, 1935, the reasoning would seem to apply equally to the case of joint tortfeasors.

§ 229. Foreign Torts ¹³

Except in the case of injuries to interests in land, an action of tort will lie in England although the cause of action has arisen abroad. Provided that the person of the defendant is within the jurisdiction of the English courts,¹⁴ he can be sued in England for a libel published in New York, or for an assault committed in Turkey. But two conditions must be fulfilled:—

- (1) The act must not have been justifiable by the law of the place where it was done;
- (2) It must be of a kind which would have been actionable as a tort had it been done in England.¹⁵

A tort has not been committed in England merely because damage flowing from a wrongful act done elsewhere has been suffered in England, even in cases where damage is the gist of the action.¹⁶

(1) Act must not be justifiable where done

The meaning which is given to the word “justifiable” in our courts is well illustrated by a comparison of two cases. In *Phillips v. Eyre* ¹⁷ an action for false imprisonment was brought against the Governor of Jamaica, who pleaded that the arrest was made in connection with the suppression of a rebellion, and

¹³ See Cheshire, *Private International Law*, Chap. 10; Dicey, *Conflict of Laws*, Chap. 28, and literature there cited; Morris, *Cases on Private International Law*, pp. 287–288.

¹⁴ For the rules on jurisdiction see *Annual Practice*, R.S.C., Ord. 11, r. 1. For torts on ships and aircraft, see Winfield, *Tort*, pp. 114–116.

¹⁵ *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1, where Willes J. formulated these two rules, which were approved by Lord Macnaghten in *Carr v. Francis, Times & Co.* [1902] A.C. 176, 182.

¹⁶ *Monro (George) Ltd. v. American Cyanamid Corporation* [1944] K.B. 492, 441. Criticised, Cheshire, *Private International Law*, pp. 293–294, and distinguished in *Bata v. Bata* [1948] W.N. 866.

¹⁷ (1870) L.R. 6 Q.B. 1.

had been declared lawful subsequently by an act of the local legislature. The Court of Exchequer upheld his plea. But in *Machado v. Fontes*¹⁸ the Court of Appeal held that the act need not be actionable in the place where it is done in order to be actionable in England. It is sufficient if it is not legally justifiable and is punishable. In that case a plaintiff recovered damages in England for a libel published in Brazil, although libel is not in Brazil a cause of action for damages, but exclusively a criminal offence. It seems curious that a man should be held liable in damages in England for doing an act abroad which exposes him to no such liability according to the *lex loci delicti*, and without any voluntary submission on his part to the English law on the matter. The decision has been much criticised as being inconsistent with the reasoning in some other cases¹⁹ as well as with principle.

(2) Act must be actionable by English law

The second condition that must be fulfilled before an action for a foreign tort will lie in England is that an act of that sort must amount to an actionable tort in accordance with the law of England—that is to say, the law which will be applied in determining the existence, measure and nature of the defendant's liability is the law of England (the *lex fori*), and not the law of the place where the tort was committed (the *lex loci delicti*). The *lex loci delicti* may serve to justify the act, as we have seen, and to exclude any action in England, but it does not create any right of action in England; this right must be given by English law itself. This rule is contrary to the principles of the conflict of laws accepted in most countries and is said to be peculiar to England, China and Japan.²⁰

A typical case where insistence on the double rule enunciated by Willes J. worked injustice was *M'Elroy v. M'Allister*.²¹ The

¹⁸ [1897] 2 Q.B. 231.

¹⁹ *The Mary Mozham* (1876) 1 P.D. 107 (where the act was certainly not innocent in Spain, yet no action lay); *McMillan v. Canadian Northern Ry.* [1923] A.C. 120. It is not accepted in Scotland: *Naftalin v. L. M. & S. Ry.*, 1933 S.C. 259; *M'Elroy v. M'Allister*, 1949 S.C. 110; or in Australia: *Koop v. Bebb* (1952) 84 C.L.R. 629; but is in Canada: *M'Lean v. Pettigrew* [1945] 2 D.L.R. 65.

²⁰ *Lorenzen*, 47 L.Q.R. 483, 499–501. It has been argued persuasively that Willes J. used the word "actionable" in its primary sense as "cognisable or triable," and that he was not referring to substantive liability: Cheshire, p. 291.

²¹ 1949 S.C. 110.

pursuer's husband, who was resident in Glasgow, was killed in a road accident in England by the alleged negligence of the defender, who was also resident in Glasgow. "If the accident had happened in Scotland, the pursuer could have recovered substantial damages in respect of *solatium* and patrimonial loss. If the action had been brought in England, she could have recovered substantial damages as a dependant under the Fatal Accidents Acts, 1846-1908, and as executrix for the deceased for loss of expectation of life under the Law Reform (Miscellaneous Provisions) Act, 1934. It was held, however, by a full court of seven judges (Lord Keith dissenting) that she could only recover £40 in respect of funeral expenses, that being the only point at which Scots and English law coincided. The claim for *solatium* failed because English law does not recognise such a claim for wrongful death. The claim under the Fatal Accidents Acts failed because the action was begun more than twelve months after the accident, contrary to section 3 of the Act of 1846. The claim under the Law Reform (Miscellaneous Provisions) Act, 1934, failed because by Scots law all rights of action vested in an injured person (as opposed to his family) for personal injuries due to negligence die with the injured person, unless he had instituted proceedings before his death."²² In order to avoid this sort of difficulty, it might be better if tort liability in the conflict of laws was governed by the proper law of the tort, so that the place where the alleged tort is committed should be only one of several elements to be taken into consideration. This view has been adopted in the New York Court of Appeals.²³

No action will lie in England for any trespass or other tort committed in respect of land situated out of England. This is so even if no question as to the title to the land is in issue between the parties, and even though the property is situated in uncivilised regions out of the territory and jurisdiction of any civilised State.²⁴ In the case of contracts and trusts, on the other hand, the jurisdiction of the English court is not excluded by the fact that the land to which the contract or trust relates is out of England.

²² Morris, *Cases on Private International Law*, 3rd ed., p. 287.

²³ Morris, Note, 79 L.Q.R. 484.

²⁴ *British South Africa Company v. Companhia de Moçambique* [1893] A.C. 602; *The Tolten* [1946] P. 135 (rule does not apply to Admiralty action *in rem*). Criticism: Morris, *Cases*, pp. 813-815.

EXTRAJUDICIAL REMEDIES

It is not necessary in all cases that a man should resort to judicial proceedings in order to seek protection or redress in respect of injuries threatened or committed against him. In many instances the law grants him liberty to help himself by his own act and strength. We shall deal in this chapter with self-redress; with self-defence and the prevention of trespass we have already dealt.¹

§ 230. Re-entry on Land

He who is wrongfully dispossessed of land is not bound to proceed for its recovery by action at law, for he may retake possession of it by his own act, if he can do so peaceably and without the use of force.² Even if he has obtained a judgment for possession he may still enter at his own risk without the aid of the sheriff.³ A forcible entry, however, even by a person lawfully entitled to the possession, is an indictable misdemeanour under the Statutes of Forcible Entry.⁴ It is provided by 5 Ric. 2, st. 1, c. 8,⁵ that under pain of imprisonment no one shall "make entry into any lands and tenements but in case where entry is given by the law, and in such case not with strong hand nor with multitude of people, but only in peaceable and easy manner." These considerations do not apply where the peace itself is being vindicated.⁶ Forcible entry, however, upon a person wrongfully in possession by a person entitled to the possession is, although a criminal offence, no civil injury for which the wrongdoer so ejected has any remedy. He can neither

¹ Above, § 52.

² *Taunton v. Costar* (1797) 7 T.R. 431.

³ *Aglionby v. Cohen* [1955] 1 Q.B. 558.

⁴ This "is the reason for the perennially comic spectacle, so dear to playwrights and novelists, of the patient or crafty bailiff trying to obtain entry without strong hand or multitude of people": Allen, *The Queen's Peace*, p. 48.

⁵ See also 15 Ric. 2, c. 2; 8 Hen. 6, c. 9.

⁶ *Harvey v. Harvey* (1884) 26 Ch.D. 644.

sue in ejectment for the recovery of the land, nor in trespass for damages.⁷ If in the course of a forcible entry an assault is committed upon the occupier or other person defending the possession, or damage is done to chattels upon the premises, will an action for damages lie in respect of this independent injury, although none lies for the entry and eviction itself? After some conflict of opinion the Court of Appeal in *Hemmings v. Stoke Poges Golf Club*⁸ held that it would not. So long as no more force is used than is necessary and justifiable at common law for the ejection of a trespasser and the removal of his goods, the fact that the entry was a breach of the Statutes of Forcible Entry does not confer upon the person ejected any cause of action for assault or otherwise.

§ 231. Recaption of Chattels⁹

Any person entitled to the possession of a chattel may retake the chattel either peaceably or by the use of reasonable force from any person who has wrongfully taken or detained it from him. Such a retaking, even though forcible, is neither a civil injury nor a criminal offence.¹⁰ As to the amount of force which is permissible, and as to the necessity of a precedent request, the defence and recaption of chattels is presumably governed by the same rules as the ejectment of trespassers upon land. The remedy of forcible recaption is not limited to cases of the wrongful taking of chattels, but extends to all cases of the wrongful possession of them.¹¹ It is a matter of some doubt how far the right of retaking chattels will serve to justify an entry on the land on which they are situated. It is clear, indeed, that if the occupier of the land has himself wrongfully taken and placed the goods there, the owner of them may enter and take them.¹² But what if the occupier is in no way

⁷ *Pollen v. Brewer* (1859) 7 C.B.(N.S.) 371.

⁸ [1920] 1 K.B. 720.

⁹ See Branson, "Forcible Recaption of Chattels" (1912) 28 L.Q.R. 262.

¹⁰ *Blades v. Higgs* (1865) 11 H.L.C. 621; *Whatford v. Carty* [1960] C.L.Y. 3258.

¹¹ *Blades v. Higgs*. It has been doubted whether this remedy extends to a mere wrongful detention of a chattel lawfully acquired: *Devoe v. Long* [1951] 1 D.L.R. 203.

¹² *Austin v. Dowling* (1870) L.R. 5 C.P. 534, 539. So if the occupier permits a wrongdoer to leave the goods on the land: *Huet v. Lawrence* (1948) S.R. (Qld.) 168.

responsible for the presence of the goods on his land, but merely refuses to give them up, or to allow the owner to enter and take them; as in the case of a lessee who gives up possession of the land, but leaves a chattel behind him, and then seeks to recover it? This is a question that has more than once come before the courts, but has not succeeded in obtaining a definite and comprehensive answer.¹³ But it is settled¹⁴ that a man who has hived bees has no right if they swarm to follow them on to another man's land, for when they get there they once more become *ferae naturae* and are the property of no one until they are again hived.

§ 232. Abatement of Nuisances

It is lawful for any occupier of land, or for any other person by the authority of the occupier, to abate (i.e., to terminate by his own act) any nuisance by which that land is injuriously affected. Thus the occupier of land may without notice cut

¹³ As the authorities stand the position seems to be as follows. A man may enter another man's land to retake his own chattels if they came there (1) by accident, e.g., if a fruit tree grow in a hedge and the fruit fall on to another's land: *The Case of Thorns* (1466) Y.B. 6 Edw. IV, 7, pl. 18; *Mitten v. Faudrye* (1626) Poph. 161; (2) by the felonious act of a third party: Blackstone, III, 5; *Higgins v. Andrewes* (1619) 2 Roll.Rep. 55. But in order to justify his entry he must show that the goods came upon the occupier's land in one of these ways or by the occupier's own act; it is not enough to prove that his property was on the land without proving the circumstances in which it came there: *Anthony v. Haney* (1832) 8 Bing. 186; still less does it suffice to justify the entry if the property came there by his own act—for example, by way of bailment. In such a case it has been held that the owner of the chattels may enter to retake them only if (1) the occupier's right of possession has been validly determined, and (2), no breach of the peace is committed: *Devoe v. Long* [1951] 1 D.L.R. 203; *Anthony v. Haney* (1832) 8 Bing. 186, 193. But in *Wilde v. Waters* (1855) 24 L.J.C.P. 193, 195, Maule J. said: "Where an outgoing tenant leaves a picture hanging on a wall, the new tenant may refuse to admit the owner, and may not choose to put himself to the trouble of giving it back, but the picture is still the owner's chattel. The question in such a case would be whether the jury could infer from the refusal that the new tenant exercised any dominion over the chattel. If it appeared that he had merely said 'I don't want your chattel, but I shall not give myself any trouble about it' that would not give the owner an action of trover." This dictum is consistent with *Thimblethorp's Case* (quoted in *Isaack v. Clark* (1614) 2 Bulstr. 306, 314) *Thorogood v. Robinson* (1845) 6 Q.B. 769, and with *British Economical Lamp Co. v. Empire, Mile End* (1913) 29 T.L.R. 386 and *Ellis v. Noakes* (1930), [1932] 2 Ch. 98, 104. Nor does *Mills v. Brooker* [1919] 1 K.B. 555, run counter to it, for in that case there was a perfectly clear conversion of the apples by sale. For other authorities, see *Webb v. Beavan* (1844) 6 M. & G. 1055; *Kearry v. Pattinson* [1939] 1 K.B. 471.

¹⁴ *Kearry v. Pattinson* [1939] 1 K.B. 471.

off the overhanging branches of his neighbour's trees,¹⁵ or sever roots which have spread from those trees into his own land.¹⁶ In these cases the abator can act without leaving his own land, but subject to certain requirements as to prior notice, which will be considered later, the right of abatement also extends to the cases in which it is necessary for the abator to enter upon the land of the other party. In abating a nuisance any unnecessary damage done is an actionable wrong,¹⁷ and therefore, where there are two ways of abating a nuisance, the less mischievous is to be followed, unless it would inflict some wrong on an innocent third party or the public.¹⁸ Previous notice must also be given where necessary. The right of abatement is alternative to damages. If the nuisance is abated, no damages can be obtained in respect of the injury suffered. The exercise of the right of abatement destroys any right of action in respect of the nuisance.¹⁹

It seems to be assumed that there is no right of entry and abatement in a case in which, although an actionable nuisance exists, an injunction against the continuance of it could not be obtained. If, for example, a house is built which obstructs ancient lights, but to so small an extent or under such circumstances that no mandatory injunction would be granted to pull the house down, it cannot be supposed that the owner of the obstructed light is nevertheless at liberty to attain the same end by the exercise of his right of abatement.²⁰ Strangely enough, however, there may apparently be a right of entry and abatement where there is no action for damages for the nuisance. So no damages can be obtained against a defendant who has allowed a tree to overgrow his boundary, unless it is the cause of actual damage²¹; for damage is of the essence of nuisance. But there is no reason to suppose that the right of the neighbour

¹⁵ *Lemmon v. Webb* [1895] A. C. 1.

¹⁶ *Butler v. Standard Telephones* [1940] 1 K.B. 399. He may not, however, appropriate to his own use the things so severed, and if he does so, he is liable in trover for their value: *Mills v. Brooker* [1919] 1 K.B. 555.

¹⁷ *Roberts v. Rose* (1865) 4 H. & C. 103.

¹⁸ *Lagan Navigation Co. v. Lambeg Bleaching Co.* [1927] A.C. 226, 245.

¹⁹ *Baten's Case* (1610) 9 Co.Rep. 53 b; *Lagan Navigation Co. v. Lambeg Bleaching Co.* [1927] A.C. 226, 244.

²⁰ This is discussed in *Lane v. Capsey* [1891] 3 Ch. 411.

²¹ *Smith v. Giddy* [1904] 2 K.B. 448; *Lemmon v. Webb* [1894] 3 Ch. 1, 11. If damage has been caused, an injunction may also be obtained: *McCombe v. Read* [1955] 2 Q.B. 429. See above, § 19.

to cut the encroaching roots and branches is subject to any such limitation.²²

Necessity of notice before abatement

The question of the necessity of notice before abatement is one involved in some uncertainty. It is clear, however, that there are at least two cases in which no notice is required: (1) When there is no entry on the land of the other party—e.g., cutting roots and branches.²³ (2) In case of emergency—i.e., where the nuisance threatens such immediate harm to person or property that the delay involved in giving notice would be unreasonable.²⁴

It seems clear also that there are four cases in which notice must be given: (1) When the nuisance was committed, not by the present occupier, but by a predecessor in title.²⁵ (2) When the occupier is not responsible for the creation or continuance of the nuisance.²⁵ (3) When the abatement involves the demolition of a house which is actually inhabited.²⁶ (4) When the more mischievous of two ways of abating a nuisance is followed.²⁷

Whether notice is required in other cases is a question to which no certain reply can be given. In *Lemmon v. Webb*²⁸ there is an obvious inclination to state the rule in the general form, that in all cases of entry and abatement notice is required except in case of emergency. In *Jones v. Williams*,²⁹ on the other hand, the opinion is expressed that the requirement of notice is exceptional.

²² Salmond regarded this as going further than a mere right of abating a nuisance—as simply a part of the occupier's exclusive right of possession, and of doing as he pleases with his own. But the overhanging branches and the encroaching roots are until severance realty, and realty which is the property of the owner of the tree: *Lemmon v. Webb* [1894] 3 Ch. 1, 20; *Mills v. Brooker* [1919] 1 K.B. 555. An overhanging roof or cornice has been held to be a nuisance to the land it overhangs because of the necessary tendency to discharge rain-water upon it: *Baten's Case* (1610) 9 Co.Rep. 53 b. It is possible that in early days on a parity of reasoning overhanging branches were similarly regarded, and that the doctrine that in such cases special damage must be proved is of later growth.

²³ *Lemmon v. Webb* [1894] 3 Ch. 1; [1895] A.C. 1.

²⁴ *Jones v. Williams* (1843) 11 M. & W. 176, 182; *Lemmon v. Webb* [1894] 3 Ch. 1, 13.

²⁵ *Jones v. Williams* (1843) 11 M. & W. 176.

²⁶ *Davies v. Williams* (1851) 16 Q.B. 546.

²⁷ *Lagan Navigation Co. v. Lambeg Bleaching Co.* [1927] A.C. 226, 245.

²⁸ [1895] A.C. 1.

²⁹ (1843) 11 M. & W. 176.

Abatement of public nuisance

It is lawful for any person to abate a public nuisance to a highway, so far as it is necessary to enable him to exercise his right of way thereon. Thus if a fence is unlawfully erected across a highway or a gate wrongfully locked, any member of the public may in the exercise of his right of way remove the fence or break open the gate. And this is so even though the obstruction has been erected in the exercise of a bona fide but unfounded claim of right. Probably this right of abatement exists only when the abator can prove that he has sustained such special damage as is required to confer upon him a private right of action.³⁰ The right of abating a nuisance on a highway extends only to nuisances of commission, and not to those of omission so as to entitle any member of the public to undertake the repair of a highway or the creation thereon of a permanent structure, such as a bridge, which he may consider necessary for the convenient exercise of his right of passage. Such acts must be done by those who are charged with the common law or statutory duty of repairing or constructing highways.³¹

The abatement of a nuisance is a remedy which the law does not favour and is not usually advisable.³² Abatement has fallen into almost complete disuse except as regards rights of common, rights of way and rights of water, for an injunction or a mandatory order has practically the same effect.

§ 233. Distress Damage Feasant³³

It is lawful for any occupier of land to seize any cattle or other chattels which are unlawfully upon his land and have done or are doing damage there, and to detain them until payment of compensation for the damage done. This right is known as that of distress damage feasant and is the only survival in modern law of "thing-liability."³⁴ In all ordinary cases the things so distrained are cattle or other trespassing animals, but

³⁰ *Campbell Davys v. Lloyd* [1901] 2 Ch. 518, 524.

³¹ *Campbell Davys v. Lloyd* [1901] 2 Ch. 518.

³² *Lagan Navigation Co. v. Lambeg Bleaching Co.* [1927] A.C. 226, 244; *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880, 911, 920.

³³ See the exhaustive discussion of this topic in Williams, *Animals*, pp. 1-123.

³⁴ i.e., the chattel itself, not its owner, is liable.

the right extends to all chattels animate or inanimate. Thus a railway company has been held entitled to seize and detain a locomotive engine which was wrongfully encumbering its lines.³⁵ So an occupier is not obliged to return a cricket ball or football which has broken his window-pane. Distress damage feasant differs from other forms of distress in that it is a remedy which can be exercised out of hand, at any time of the day or night.³⁶ The right of distress damage feasant is vested, in general, only in the occupier of land. Mere use without exclusive possession is, it may be assumed, as insufficient to confer this right as it is to confer the right to eject a trespasser or to sue in an action of trespass.³⁷

Limits of right of distress

(1) *Object's presence must be wrongful*

The thing distrained must be unlawfully on the land—i.e., it must be there under such circumstances that an action for damages will lie against the owner or some other person responsible for it. When no action will lie, there can be no distress either: for example, when cattle, being lawfully driven along the highway, stray into the adjoining land, there is neither action nor right of distress unless they are allowed to remain there for a time longer than is reasonably necessary for their removal.³⁸ The right of action, however, need not be against the owner of the thing distrained. If the thing is present by the wrong of him who had the custody of it, or possibly even by the wrong of a mere stranger, it may be seized and detained as a security for compensation.³⁹

(2) *Actual damage*

There must be actual damage done by the thing distrained; for it is rightly taken and detained only as a security for the payment of compensation, and when there is no damage done

³⁵ *Ambergate Ry. v. Midland Ry.* (1853) 2 E. & B. 793.

³⁶ *Watkinson v. Hollington* [1944] K.B. 16, where Scott L.J. gives a useful summary of the law. As reported in [1943] 2 All E.R. 573, 574, he said that the right differed because it was exercised not by taking but by keeping possession.

³⁷ *Burt v. Moor* (1793) 5 T.R. 329.

³⁸ *Tillett v. Ward* (1882) 10 Q.B.D. 17.

³⁹ 1 Roll.Ab. 665, *Distress*, D.

there can be no compensation due. Though there can be no right of distress unless there has been an infringement of the right to land either by trespass or nuisance, once that infringement is established the damage need not be done to the land itself or to things forming part of the freehold, such as crops. It is sufficient if damage is done on the land to the property or, presumably, the person of the occupier.⁴⁰

(8) *Object must still be on land*

The thing must be seized while still on the land. There is no right of following it, even in fresh pursuit, and even if it is purposely removed by its owner in order to avoid distress.⁴¹ But once the beasts have been distrained, they can be retaken in fresh pursuit, if they have escaped.⁴² In spite of some authority to the contrary it does not seem that the thing distrained need have been caught *flagrante delicto* doing damage,⁴³ but if the same thing comes more than once upon the same land it cannot be distrained or detained on a subsequent occasion in respect of damage done by it on a former visit.⁴⁴ If several animals or other things belonging to the same owner trespass and do damage, each of them can be distrained and held for its own share of the damage only; one of them cannot be detained as a security for the whole claim.⁴⁴ It is not lawful by way of distress damage feasant to take a thing out of the immediate personal control or use of another person: for example, a horse which another person is wrongfully riding across one's land.⁴⁵ This is an exception said to be established in the interests of the public peace. Nevertheless the occupier retains his right of forcibly removing from the land, though not of seizing and detaining, the things which a trespasser thus brings with him.

(4) *No right of sale*

The right of distress damage feasant includes no right of sale, but merely a right to retain the thing until adequate compensation is made. Formerly the law was the same in the case of

⁴⁰ *Boden v. Roscoe* [1894] 1 Q.B. 608.

⁴¹ *Vaspor v. Edwards* (1701) 12 Mod. 658; *Clement v. Milner* (1800) 3 Esp. 95.

⁴² *Williams, Animals*, pp. 103-104.

⁴³ *Ibid.*, pp. 84-85.

⁴⁴ *Vaspor v. Edwards* (1701) 12 Mod. 658, 660.

⁴⁵ *Field v. Adames* (1840) 12 A. & E. 649.

distress for rent also, but the statutes which confer a power of sale on landlords have left unaffected the common law as to distress damage feasant.⁴⁶ But the right of the occupier is to detain only until compensation is paid for the damage done. It is the duty of the owner of the animal to form an estimate of the amount of the damage and make a tender of that sum, and he is not exempt from this duty however extortionate the demand made by the distrainer.⁴⁷ Things distrained damage feasant may at the option of the distrainer be kept by him on the premises where they were seized, or kept in his own custody elsewhere, or impounded by him in a public pound.⁴⁸ By the Protection of Animals Act, 1911 (s. 7), he is bound to provide animals impounded by him with food and water.

(5) *Alternative to action*

The exercise of the right of distress damage feasant suspends the right of action for the damage complained of, so long as the detention of the property continues. Distress and action are alternative remedies which cannot be concurrently pursued. If, however, the property distrained perishes or is lost without the distrainer's fault, he is remitted to his right of action, and so also if the property is restored to the owner.

⁴⁶ In one respect distress damage feasant is more favoured than other forms of distress: it may take place at night: "otherwise it may be the beasts will be gone before he can take them." Co.Litt. 142a.

⁴⁷ *Sorrell v. Paget* [1950] 1 K.B. 252, 265. In this case the distrainer's demand was for a sum as "salvage." Although "salvage by land is a legal chimera" (Asquith L.J.) this did not excuse the wrongdoer from making a tender.

⁴⁸ *Vaspor v. Edwards* (1701) 12 Mod. 658, 664. "As a public institution the pound was commonly referred to in our literature of a hundred years and more ago. I hope that a good many people recollect that in, perhaps, the most celebrated of English novels Mr. Pickwick was removed by Captain Boldwig to the village pound under the imputation of being a drunken plebeian"; *Searle v. Wallbank* [1947] A.C. 341, at 350, per Lord Maugham.

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